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THE UNIVERSITY OF ALBERTA

PICKETING: A COMPARISON OF THE LAW IN BRITAIN AND ALBERTA

BY

LYNN PARISH

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS.

FACULTY OF LAW

EDMONTON, ALBERTA

(FALL, 1988)

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled PICKETING: A COMPARISON OF THE LAW IN BRITAIN AND ALBERTA submitted by LYNN PARISH in partial fulfilment of the requirements for the degree of Master of Laws.

Supervisor

Tim Christian

Edward G. Fisher

Date: Sept. 29, 1988

DEDICATION

To my father Alf Parish, National Secretary of the National Graphical Association 1982.

I would also like to acknowledge the roles of the following people. Firstly Dr. Keith Ewing of Trinity Hall, Cambridge who agreed to be my supervisor whilst spending a year at the University of Alberta. He assisted me in the organization of my material and was constantly on hand to discuss issues. Secondly the members of my defence committee, Dean Timothy Christian, Professor Jim Robb and Professor Ged Fisher for the vital role that they played at the end of my studies. Thirdly, the staff of the Law Library at the University of Alberta who were never too busy to help. Last, but certainly not least, my typist Jill Phillips for her skill and patience.

ABSTRACT

This thesis compares the law in Britain and Alberta in relation to picketing during the course of a labour dispute. The picketing laws in both jurisdictions are also considered in the light of national statutes and international conventions that set out fundamental freedoms to see if the picketing laws uphold the principles found therein.

The thesis begins with a statement of the human rights statutes and conventions that apply to Britain and Alberta and are relevant to picketing. There follows a history of the way the civil and criminal law in Britain has developed until the Conservative Government took office in 1980. The changes that occurred in the law after 1980 are then documented. The same historical timetable is followed for the development of picketing law in Alberta. Related topics that are considered in respect of Britain and Alberta are injunctive orders, police procedure and the ability of employees to strike.

Finally it is shown that the tenor of picketing legislation is restrictive in Britain and Alberta despite the existence of two different collective bargaining regimes. Further, the legislation in both jurisdictions does not accord with the principles of freedom of expression and freedom of assembly. New legislative proposals in Britain and Alberta are also studied and the conclusion is drawn that no meaningful right to picket during the course of a labour dispute exists in either jurisdiction.

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CHAPTER I - INTRODUCTION

Industrial action is a term which can be used to describe various activities participated in by workers with a grievance against an employer. A strike involves a withdrawal of labour by employees. Boycotting or blacking, as it is often called in Britain, involves workers refusing to deal with goods or products manufactured by an employer with whom they or fellow trade unionists have a dispute. This paper concentrates on the action of picketing.

Picketing has been described as[1] "an action to support the primary collective bargaining sanction: the strike. Occasionally it is the sole action where a strike is infeasible or impossible". For workers who are on strike picketing is generally one of the most important and obvious methods by which the dispute can be brought to the attention of the public. Picketing involves attendance by strikers and sympathizers in varying numbers at an employer's premises (primary picketing) , or the premises of a supplier or customer of the employer (secondary picketing). The purpose of picketing is to inform the public, other employees, customers and suppliers that there is a dispute with the primary employer. The pickets relay information about the strike in an effort to persuade others not to do business with the primary employer.

Picketing may be viewed as having a two-fold purpose. Firstly, the purpose is to inform the public, other employees, customers and suppliers that there is a dispute with the primary employer. This conduct falls into the category of communicating or obtaining information. The second purpose is to persuade others not to cross the picket line. The targets of this persuasion would be other employees who are not on strike, customers and suppliers. Such conduct falls into the category of persuading others to work or not to work.

It will be seen from a discussion of the cases and the statutes that have applied over the years in Britain and Alberta that full recognition has not always been given to the purposes of picketing. Most commonly picketing is enjoined because it goes beyond obtaining or communicating information and is operating to persuade others to leave work. The tort that is most often used against a picket line is inducing breach of contract. It is submitted in this thesis that picketing is only effective when it operates as an instrument of persuasion. An employer can quite easily continue to operate his business with the use of strikebreakers if the conduct of the pickets is restricted to standing outside holding placards and leaflets. To be effective picketing must be allowed to persuade others not to cross a picket line.

As can be seen from the above discussion establishing the borderline between permissable and impermissible conduct on the picket line is one of the most emotive and difficult issues in labour law. This paper attempts to trace the development of the common law and statute law which has regulated conduct on the picket line in Britain and Alberta since the beginning of the twentieth century. Britain and Alberta have been chosen for comparison because the early Canadian legislation which dealt with for comparison because the early Canadian legislation which dealt with picketing was modelled on British statutes. The early regulation of picketing was by means of the criminal law. The civil liability of pickets was largely the creation of judicial invention. In Alberta in particular, a statutory section was not enacted until 1960 to define permissable conduct on the picket line. Canadian judges relied to a great extent on British precedents so that there is some similarity in the substantive law and jurisprudence relating to picketing in both jurisdictions. This was despite the fact that during the twentieth century the systems of collective bargaining evolved quite differently in Canada and Britain, with the Canadian system being far more similar to that of the United States.

In Canada after 1935 the Federal Government borrowed concepts from legislation in the United States of America. The Canadian system of collective bargaining became closely regulated by statute. One of the cornerstones of the Canadian system is the concept of the legal strike which can only be participated in, in certain circumstances defined by statute. In 1925 the Privy Council had held that the provinces should have jurisdiction over labour relations.[2] The provinces duly enacted their own labour relations statutes including the common law province of Alberta. The provincial statutes were closely modelled on the Federal statutory system.

Thereafter this paper concentrates on the development of the law of picketing in Alberta. It is not suggested that labour relations, labour legislation and judicial pronouncements thereon in Alberta are typical of the rest of common law Canada. However the labour law of Alberta has not been subject to constant commentary and it is perhaps worthy of study on that basis alone.

In Britain there was already a system of voluntary collective bargaining in place at the beginning of the twentieth century. During the first seventy years of the century the collective bargaining system was accompanied by non-interventionary legislation. There was no concept of a legal or illegal strike,[3] no duty to bargain and no concept of unfair labour practices. Such legislation as existed merely gave trade unions and those acting "in contemplation or furtherance of a trade dispute"[4] immunity from various tortious actions.

Chapters 2 and 4 study the development of the collective bargaining systems in Britain and Alberta in relation to picketing. These chapters also explain how the criminal law was used in addition to the civil law to regulate picketing. In fact the criminal law was the dominant mechanism by which picketing was regulated in the early part of the twentieth century in Britain and Alberta. Pickets would be arrested and charged with, amongst other things, the offences of watching and besetting and intimidation.[5] Employers came to use the civil law to restrict picketing when the granting of injunctions was extended to labour disputes.[6] In Lyons v. Wilkins,[7] a late nineteenth century British case, the Court of Appeal upheld the application of an employer to impose an injunction on pickets based on a breach of a criminal statute. Subsequently however, injunctions were more often based on a breach of the civil law. Various statutory and judge-made rules developed concerning the liability of unions when taking industrial action and in relation to the circumstances in which injunctions should be imposed. Chapters 2 and 4 look at the development of these rules.

In 1980 in Britain the Conservative Party was elected into office. Since that time labour law statutes in Britain have undergone considerable transformation. Chapter 3 looks at the impact of the new statutes on the law of picketing. Since 1980 injunctions have been used increasingly to regulate picketing and the judge made rules regarding the imposition of injunctions have continued to develop. Criminal prosecutions for public order offences on the picket line have become commonplace and may become more so since the passing of the Public Order Act 1986.

Alberta has traditionally been a conservative province in its attitude to labour relations largely as a result of having a Social-Credit Government for thirty-seven years. Legislative changes in labour law were underway prior to 1980 but these changes have been accelerated and continued by the Conservative Party who were re-elected into office in 1980. The most fundamental change has been the taking away of the right to strike from certain groups of employees. Due to the nature of the statutory regime the right to picket is a corollary of the right to strike, so that in effect two rights which they formerly possessed have been denied to employees. Chapter 5 looks at these developments in Alberta, together with the developments in the judge-made rules regarding the imposition of injunctions in labour disputes and the use of the criminal law against pickets. The role of the Labour Relations Board in Alberta is also looked at in relation to picketing cases.

The purpose of Chapters 3 and 5 is to demonstrate how despite different systems of collective bargaining and different forms of statutory provisions to regulate picketing, the effect of the law on the practice of picketing in both jurisdictions is very similar.

Picketing can also take place and very often does, in non trade dispute situations. It is an effective form of demonstration and is used to show public disapproval of, amongst other things, nuclear weapons, apartheid and even real estate development.[8] Although this paper concentrates on picketing in a trade dispute situation, mention will be made of picketing which has occurred in other contexts.

Picketing is a form of expression and both Britain and Canada have expressed themselves as nations to be in favour of freedom of expression and assembly. Britain and Canada have ratified the Universal Declaration of Human Rights,[9] articles 19 and 20 of which are as follows:

> Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
>
> Article 20. Everyone has the right to freedom of peaceful assembly and association.

Britain and Canada have ratified the United Nations International Covenant on Civil and Political Rights,[10] articles 19 and 21 of which are as follows:

> Article 19
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.
>
> Article 21
>
> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Britain is a party to the European Convention of Human Rights and Freedoms,[11] articles 10 and 11 of which provide as follows:

> Article 10
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> Article 11
>
> 1. Every has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

In 1982 Canada enacted the Charter of Rights and Freedoms,[12] section 2 of which provides as follows:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

In terms of applicability the Charter is of more direct application in Canada than the three aforementioned conventions are in Britain or Canada. Already, the Supreme Court of Canada has given judgment in a case involving picketing and the Charter. In R.W.D.S.U. v. Dolphin Delivery[13] it was held that picketing is a form of expression and is to be protected as such. However the Supreme Court further held that in certain circumstances the court was justified in restricting the freedom to picket under section 1 of the Charter. Section 1 enables a court to limit the extension of freedoms if they are "reasonably justified in a free and democratic society". The Court went on to say that the Charter did not apply to private litigation, only to government action. This case fell into the former category. Dolphin Delivery will be discussed in more detail in Chapter 5. For present purposes it is sufficient to note how restricting declarations of human rights can in fact be in practice.[14]

In conclusion Chapter 6 summarizes the ways in which picketing is restricted in Britain and Alberta today to show that to a great extent the same restrictions apply. Consideration is given to proposals for new legislation in Britain and Alberta to see how these proposals affect the law and what trends they reveal. Finally the picketing laws are viewed in the light of the fundamental freedoms enshrined in international conventions to see to what extent the freedoms are upheld.

There are some aspects of the way in which picketing in a trade dispute is regulated which cannot be adequately dealt with in this paper due to lack of space. Such issues as contempt of court, use of the representative action are lengthy topics in their own right and they are therefore only briefly alluded to in this paper.[15] Finally, the law is stated as at May 1988. There are proposals for new labour legislation in Britain and Alberta and these proposals are dealt with in chapter 6.

However the majority of this paper deals with the statutory law as of May 1988.

FOOTNOTES - Chapter 1

1. A.W. Carrothers Collective Bargaining Law in Canada (2nd ed. 1986) at 608-9.

2. Snider v. Toronto Electric Commissioners [1925] 1 W.W.R. 785.

3. The Trade Union Act 1927 did attempt to distinguish between legal and illegal strikes in Britain but the Act was of no practical effect as it was rarely used.

4. This phrase was christened the golden formula (Wedderburn The Worker and the Law (2nd ed. 1965) 222 and was used in most British labour relations statutes.

5. See Section 7 Conspiracy and Protection of Property Act 1875 (U.K.) 38 and 39 Vict. c.86 (see Appendix 1) and Section 381 Criminal Code R.S.C. 1970, c.C-34 (see Appendix 2).

6. See Springhead Spinning Co. v. Riley (1868) L.R. 6 Eq. 555.

7. [1899] 1 Ch. 255.

8. e.g. Hubbard v. Pitt [1975] 2 All. E.R. 1

9. Adopted by UN General Assembly 1948. Canada acceded to the covenant on May 19, 1976. Before this the Federal Government recorded the agreement of all provinces and all undertook, to take measures to implement the covenant in their respective jurisdictions.

10. Adopted by U N General Assembly 1967.

11. Ratified by the U.K. 1951. Such a treaty requires implementing legislation before it has effect in the U.K. Such legislation has never been enacted.

12. Canada Act (U.K.) 1982, c.11.

13. [1987] 1 W.W.R. 577.

14. See Christian and Ewing "Labouring under the Canadian Constitution" (1987) Camb. L.J. 195.

15. For some discussion of these topics see S. Auerbach "Legal Restraints of Picketing: New Trends; New Tensions" (1987) 16 I.L.J. 227.

CHAPTER 2 - HISTORY OF THE LAW RELATING TO PICKETING IN BRITAIN 1900 - 1979

I Introduction

Historically picketing has been regulated by the civil law and by the criminal law. In the context of the civil law picketing, like other forms of industrial action, can give rise to liability under one or more of the economic torts. The economic torts have developed over the years largely by judicial invention. The three torts which will be discussed below in relation to picketing are conspiracy, inducing breach of contract and intimidation. It will be shown how British statutes gave trade unions certain immunities from tortious liability. It will also be shown how those same statutes provided judges with the necessary loopholes to find that the immunities did not apply if the industrial action was not "in contemplation or furtherance of a trade dispute".

The means by which plaintiff employers seek to curtail industrial action is by commencing a legal action and then applying for an interlocutory injunction. The traditional rationale for granting an injunction in the midst of a legal action is to maintain the status quo pending trial. However as will be shown the rationale is not valid with regard to the granting of an injunction in the midst of a labour dispute.

Picketing is a form of public demonstration and is therefore subject to the criminal laws which regulate conduct in public. This chapter will discuss the origins of the criminal liability of pickets for nuisance and intimidation. Two decisions of the Court of Appeal, Lyons v. Wilkins[1] and Ward Lock v. Operative Printers Assistants' Society[2] have never been fully reconciled as to the extent to which picketing can constitute a nuisance.

As a form of public demonstration pickets inevitably come into contact with the police. The development of public order offences will be outlined. This section will also discuss the considerable amount of discretion that police officers have in regulating conduct on the picket line.

Before discussing the development of the civil and criminal liability of pickets it is useful to outline the status of trade unions in Britain at the beginning of the twentieth century.

In 1800 all combinations of workmen formed for the regulation of conditions of work had been made illegal by the Combination Act,[3] as constituting a common law conspiracy. Some combinations were freed from such strictures in 1825[4] by the Combination Laws Repeal Act Amendment Act. There were severe penalties in section 3 of this Act for those who by violence to person or property, threats or intimidation, molestation or obstruction in any other way prevented others from working. Citrine describes[5] how these "vague" terms produced variations of judicial definitions and that the practical result was to make peaceful picketing illegal. The form of the legislation also produced the anomalous situation that a union could not threaten an employer to strike for a wage rise, but could legally conduct a strike on this issue. The Molestation of Workmen Act of 1859[6] went some way towards remedying the anomaly, making it no longer criminal to peacefully persuade others to quit work. However, this Act only applied to trade disputes about wages and hours and was only protection from the penalties of molestation and obstruction contained in section 3 of the Combination Laws Repeal Act Amendment Act. Picketing therefore continued to be hazardous.

Despite such constraints membership in trade unions was growing. In 1868 a meeting was held of thirty-four representatives of trades councils and federations of trade societies which was the foundation of the Trades Union Congress. Unskilled workers were joining unions to add their voices to those of the skilled craftsmen. The Liberal Government extended the franchise in 1867[7] to more working people and on the basis of the minority report of a Royal Commission[8] two reform statutes were passed in 1871. The first was the Trade Union Act[9] which provided that members of a trade union were not liable for criminal conspiracy by reason of the union's purposes being in unlawful restraint of trade. Agreements and trusts of a trade union were henceforth to be legal and valid[10] and a system of registration for trade unions was introduced.

More contentious so far as picketing laws were concerned was the content of the second Act passed in 1871, the Criminal Law Amendment Act.[11] This Act repealed the Combination Laws Repeal Act[12] and the Molestation of Workmen Act.[13] In a detailed first section the new statute prohibited anyone from using violence to person or property or threatening, intimidating, molesting or obstructing another with a view to coercing that person to take certain actions. Thus, a person could not intimidate an employer so that he would dismiss an employee, not offer work to particular workmen or alter the mode of his business. A person was deemed to molest or obstruct another in the following cases:

> (1) If he persistently follows such person about from place to place;
> (2) If he hides any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof;
> (3) If he watch or beset the house or other place where such person resides or works or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follows such person in a disorderly manner, in or through any street or road.

Anyone convicted under this section was liable to imprisonment with or without hard labour for up to three months.

The Criminal Law Amendment Act[14] thus did not allow a threat to strike and the wide definition of molestation and obstruction made any effective picketing impossible. In R v. Bunn[15] decided one year after the Act was passed a group of London gas stokers were charged with several counts of common law conspiracy when they threatened to strike unless a colleague was reinstated. Counsel for the defendants attempted to argue that the counts of common law conspiracy were no longer valid if they did not fall within the terms of the Criminal Law Amendment Act. Brett J. dismissed the arguments and held that common law conspiracy was not affected by the statute. Brett J. therefore put two counts of conspiracy to the jury. The first was an agreement by the defendants to force their employers to conduct the business of the company contrary to their own will by an improper threat or molestation. The second was an agreement to do a lawful act by unlawful means, that is, to prevent the company from carrying on business by the employees illegally breaking their contracts.

Another feature of this case is the subtle way that Brett J. introduces the question of the public interest. In his summing-up to the jury the attitude of Brett J. to the public interest is inconsistent. At first he states that the defendants owed no duty to the public whose gas supply would be disrupted in the event of a strike,[16] and the jury should disregard this aspect. He later reintroduces the public interest by stressing the obligation that the gas company had to the public.[17] The men were convicted on the second count only and it is of course not possible to tell what aspects of the summing up influenced the final decision. However the prospect of London and the suburbs being plunged into darkness as a result of the strike would surely have influenced a male property-owning jury in their deliberations, even though such considerations were far removed from the issue of the actual dispute.

It is interesting to see the factor of the public interest being used in this way in an early labour dispute case. Later cases, civil and criminal, would use the concept of the public interest often to justify prohibiting certain union conduct including picketing. Whether such a malleable concept as the public interest is a factor which should be weighed in the balance in labour dispute cases will be studied in relation to those later cases.

A Royal Commission on labour laws sat in 1874. As a result of the report it produced, the Criminal Law Amendment Act[18] was repealed and the Conspiracy and Protection of Property Act[19] passed in 1875. These events are examples of a pattern which was to characterize British industrial relations legislation for the next century[20] and is indicative of the curious interaction between the unions, judges and Parliament. Statutes were passed by Parliament and action would then be taken in reliance on the statute by the unions. The judges would then add their own interpretation, usually going beyond the terms of the statute in carving out new areas of liability for the unions and necessitating the whole reform process to begin again.[21]

The Conservative Government under Disraeli which passed the Conspiracy and Protection of Property[22] Act 1875 knew how increasingly important the working class vote was becoming and the statute was hailed as a great victory by trade unionists. Section 3 of the Act provided that:

> An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and their men shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

The phrase "in contemplation or furtherance of a trade dispute" was to be repeated many times in British legislation and was later christened as "the golden formula".[23] The form that this statutory provision took was in itself a feature of the pattern earlier described of the interaction between Parliament, the union and the judges. Section 3 of the 1875 Act gave an immunity to trade unionists from prosecution for common law conspiracy, but it did not give a right to strike. It was therefore up to the judges to decide if this immunity covered all forms of industrial action and to devise their own tests for the golden formula. If the law thus produced was in an unsatisfactory state according to the government of the day, it would have to be changed.[24]

II The Development of the Civil Law

(1) Liability in Tort

(a) Conspiracy

As was shown above section 3 of the Conspiracy and Protection of Property Act 1875 abolished the crime of conspiracy where people could be said to be acting in contemplation or furtherance of a trade dispute. Conspiracy was developed as a tort in the late nineteenth century.[25] In 1893 the Court of Appeal held in Temperton v. Russell[26] that a group of trade unionists were liable for a malicious conspiracy to injure by preventing materials from reaching a builder. The House of Lords confirmed the application of conspiracy to trade dispute cases in 1901 in Quinn v. Leatham.[27] Lord Brampton defined conspiracy as[28] "the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."

In modern times the tort of conspiracy is now virtually extinct as a result of the decisions in Crofter Handwoven Harris Tweed v. Veitch[29] in 1942 and Lonrho Ltd. v. Shell Petroleum[30] Co. Ltd. in 1982. The sum of both cases is that there is no liability for conspiracy to injure or conspiracy to use unlawful means if the defendants predominant purpose is to protect their own interests. The effect of the cases has been that conspiracy is no longer used as a basis for tortious liability in cases of industrial disputes.

(b) Inducing Breach of Contract

The tort of inducing breach of contract has enjoyed quite a different life to the tort of conspiracy. Inducing breach of contract is often used as a weapon against the picket line, particularly in Canada.

The tort originated in its modern form[31] in the case of Lumley v. Gye.[32] In that case the defendant theatre manager persuaded Miss Wagner to sing at Her Majesty's Theatre, although she was already a party to a contract with the plaintiff to sing for three months at the Queens Theatre. Crompton J. in the Court of Appeal extended the law beyond the concept of allowing the employer to maintain an action against the employee for breach of contract. He allowed the employer to sue a third party, the defendant theatre manager, who was not a party to the employment contract. Crompton J. envisioned that the tort thus pronounced,[33]

> ...in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act...

The tort was applied to an industrial dispute situation in _Temperton_ v. _Russell_.[34] Building unions were in dispute with certain employers. In order to put pressure on the employers the unions approached the plaintiff supplier to ask him to stop supplying materials to the employers. The plaintiff refused whereupon the union approached a customer of the plaintiffs and told him that if he took supplies from the plaintiff he would lose his own workmen. The customer duly broke his contract with the plaintiff. The plaintiff sued the union for inducing breach of the contract. Lord Esher M.R. applied _Lumley_ v. _Gye_ to the facts and found that the act of inducing was wrong because it was malicious. The requirement of malice was also found to be present in the case of _Trollope and Sons_ v. _London Building Trades Federation_.[35] As a protest about employers employing non-union labour a union published a black list of non-union workmen employed by the plaintiff. The action was brought on the basis that the black list would injure the firm in its trade or business, induce workmen to leave the firm, deter others from working there and bring the firm into contempt with their workmen and the public. Kekewich J. found that the primary motive of the defendants was to injure the workmen.

Malice became less important as an element in the tort of inducing breach of contract with the development of a defence of justification. The defence involves a genuinely held motive of self interest and thus places more emphasis on what the defendants' motives are and not whether they are malicious or not. The defence was applied in a negative fashion in South Wales Miners Federation v. Glamorgan Coal Co. Ltd.[36] The House of Lords held that a defence of justification had no place in a case concerning breach of contract. Lord James disposes of the defence of justification in one sentence.[37]

> The fact that their motives were good in the interests of those whom they moved to action does not form any answer to those who have suffered from the unlawful act.

Picketing is particularly vulnerable to the tort of inducing breach of contract because of the fact that sympathetic workers will very often refuse to cross a picket line during a dispute. In Canada judicial notice is often taken of the picket line rule and the picketing enjoined.[38] In Britain employers have more often used legal action to prohibit the strike rather than the picket line supporting the strike. Inducing breach of contract has therefore been applied to forms of secondary action more often than to primary picketing in Britain.[39]

(c) Intimidation

Section 7(1) of the Conspiracy and Protection of Property Act 1875[40] includes the criminal offence of intimidation. The Trade Disputes and Trade Union Act was passed in 1927.[41] Section 3 of the Act was directed towards picketing and is fully set out in Appendix 1. The section forbade people from picketing in an intimidating manner. "To intimidate" was defined as causing someone to reasonably believe that they or their family would be injured or their property damaged. Subsection 2 defines injury very widely as to include loss of business, occupation, employment or other source of income. Subsection 4 made it illegal to picket a person's home.

Not surprisingly the trade union movement was very concerned at these and other aspects of the 1927 Act. The Act was never used very much. Citrine has attributed this fact to increasing recognition of trade unionism in Britain at this time.[42] In any event when the Labour Government was elected in 1945 it repealed the 1927 Act in its entirety.[43]

However the 1927 Act was not to be the last word with regard to civil intimidation. In 1961 the case of Rookes v. Barnard[44] was heard at first instance and it was held by Sachs J. that three union officials had committed the tort of intimidation by threatening an employer. Two of the officials were employed by this employer. The threat was to cause employees (who were union members) to strike in breach of a no-strike agreement incorporated into their contracts, unless the employer dismissed an employee who had left the union. The dismissed employee in effect sued the union officials for causing the breach of his employment contract to which they were not a party by threatening to commit breaches of their own employment contracts to which the plaintiff was not a party. The unlawful means necessary for the commission of the tort were found in the threat to breach employment contracts which did not enjoy statutory protection. As one union official was not in fact employed by the employer who was threatened, all three union officials were made liable as conspirators.

The Court of Appeal[45] overturned the decision. Donovan L.J. found that unlawful means implies criminal or tortious conduct only. In considering the industrial reality of strikes he found that it would be[46] "...affectation not to recognize that in the majority of strikes, no such notice to terminate the contract is either given or expected." The House of Lords[47] unanimously reversed the decision of the Court of Appeal, accepting that there was a tort of intimidation which required unlawful means. Lord Devlin found that the tort of intimidation was already described in 'Salmond on the Law of Torts'[48] and applied the definition to the facts in Rookes v. Barnard. The effect of the case thus decided by the House of Lords was to produce the situation as envisaged by Donovan L.J. that[49] "...the policy in order to avoid liability is to strike first and negotiate afterwards."

The Trades Dispute Act 1965[50] was hastily passed to protect those who threatened to breach employment contracts from liability for intimidation. Section 1 provided as follows,

> (1) An act done after the passing of this Act by a person in contemplation or furtherance of a trade dispute should not be actionable in tort on the ground only that it consists in his threatening -
>
> (a) that a contract of employment (whether one to which he was a party or not) will be broken, or (b) that he will induce another to break a contract of employment to which that other is a party; or be capable of giving rise to an action of reparation on the ground only that it so consists

The protection of the Act was not however all-encompassing. Most obviously it did not protect those who could not be said to be acting in contemplation or furtherance of a trade dispute. The ambit of the tort of intimidation is now defined in 'Salmond on the Law of Torts' as follows,[51]

> It is an actionable wrong intentionally to compel a person, by means of a threat or an illegal act, to do some act whereby loss accrues to him.
> In certain cases it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to the plaintiff: for example, the intimidation of the plaintiff's customers whereby they are compelled to withdraw their custom from him, or the intimidation of an employer whereby he is compelled to discharge his servant, the plaintiff. There are at least two cases in which such intimidation may constitute a cause of action:
> (1) when the intimidation consists in a threat to do or procure an illegal act;
> (2) when the intimidation is the act, not of a single person but of two or more persons acting together in pursuance of a common intention.

Exactly what unlawful means are necessary for liability to be founded on the tort has not been clear.[52] Threats to strikebreakers are made on picket lines and chapter 3 will show how threats of violence and threats to commit a tort have also been accepted as unlawful means.[53]

(2) Immunity from Liability in Tort

(a) Trade Disputes Act 1906[54]

The civil liability of trade unions became a matter of concern in 1901 when the House of Lords held that trade unions could be sued in their own name.[55] Two weeks later the House of Lords defined the extent to which unions could be liable for conspiracy.[56] Trade union funds were therefore exposed to tortious actions. To study this matter the Conservative Government set up a Royal Commission on Trade Disputes and Trade Combinations in 1903. As no union leader was appointed to the Commission the unions refused to give evidence to it. The resulting report therefore did not go as far as the unions wished.[57]

The succeeding Liberal Government introduced their own bill which became the Trade Disputes Act 1906.[58] The full text of the Act is set out in Appendix 1. It is a short Act of five sections which did not give the unions a right to pursue industrial action. Instead the Act gave a defendant immunity from certain tortious actions if he could establish that he was acting in contemplation or furtherance of a trade dispute. Thus section three provided that a person was not liable for inducing breach of an employment contract or interfering with anothers business if he was acting in contemplation or furtherance of a trade dispute. Trade unions were given immunity from tortious actions altogether by section 4.

The phrase "in contemplation or furtherance of a trade dispute" came to be known as the golden formula.[59] Inevitably a wealth of jurisprudence has developed as to the meaning of the golden formula. It is obviously in the interests of the plaintiff to establish that the formula does not apply so as to make the union officers liable. In cases where the golden formula was held not to apply the judges continued to develop the common law. Thus in 1952 the Court of Appeal held in D.C. Thompson v. Deakin[60] that inducing breach of contract could be committed directly or indirectly. Indirect inducement was only tortious if "wrongful means" were used.

Breach of commercial contracts was not protected by the 1906 Act. In Stratford v. Lindley[61] union officials were held liable for inducing breaches of hiring contracts even though they could not possibly have known of the details of the contract which produced the breach. Lord Denning in the Court of Appeal did much to extend the area of liability for inducing breach of contract. In Emerald Construction Co. Ltd. v. Lowthian he held:[62]

> If the officers of the trade union, knowing of the contract deliberately sought to procure a breach of it they would do wrong: see Lumley v. Gye. Even if they do not know of the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye.

In Daily Mirror Newspapers v. Gardner[63], Lord Denning founded a new version of the tort; interference with business short of breach of contract by unlawful means. Such an extension had to be made to fit the facts of this particular case, where actual evidence of the commercial contract which existed was very weak and it could not be definitely said that it had been breached or not. The true situation was more akin to a course of dealing over time with no written terms. Instead of finding that some of the established torts applied, Lord Denning chose to extend the ambit of inducing breach of contract. The basis and scope of the new tort was criticized,[64] but it was to receive judicial approval by the House of Lords in 1982.[65]

The tort of interference with business short of breach of contract was also applied in Torquay Hotel Co. Ltd. v. Cousins.[66] The defendant union was seeking to organize hotel workers at one of the plaintiff company's hotels. In pursuance of this object, the union informed Esso who supplied fuel to the plaintiffs that there was a dispute and that the union would try to prevent deliveries. Esso and the plaintiff had a contract which provided in a force majeure clause that neither were to be liable if the contract could not be fulfilled because of circumstances beyond their control such as a labour dispute. Esso informed the plaintiff that they could not deliver the fuel motivated no doubt by the fact that the men who drove their oil tankers belonged to the same union that was seeking recognition. Their drivers would probably not have crossed the picket lines outside the hotel.

The plaintiffs did obtain oil from elsewhere and later obtained a subsequent delivery from Esso. In the meantime however they sought a quia timet injunction against the union. This is an application which can be made in circumstances where the plaintiff fears immediate damage if a prompt court order is not made. Lord Denning found that the union was not protected by statute because there was no trade dispute with this particular hotel where the union had no members. The union could not take advantage of the force majeure clause. Lord Denning went on to hold that the imposition of a quia timet injunction was warranted.[67]

> I put my decision on the simple ground that there is evidence that the defendants intended to interfere directly and deliberately with

> the execution of the existing contracts by Esso and future contracts by Alternative Fuels so as to prevent those companies supplying oil to the Imperial Hotel.

The unlawful means were found in the fact that the drivers of the oil tankers would be induced to break their employment contracts by not delivering the oil. The decision of the Court of Appeal in Torquay Hotel was upheld in a subsequent case by the House of Lords in 1983.[68]

(b) The Trade Union and Labour Relations Act 1974[69]

In 1965 a Royal Commission on Trade Unions and Employers Associations was set up after the House of Lords decision in Rookes v. Barnard.[70] Under the chairmanship of Lord Donovan the Commission produced a report in 1968.[71] The report reflected the preoccupation of those involved in British industrial relations with the question of the unofficial strike. Only a very short space in the report is given to picketing.[72]

In 1971 the Conservative Government passed the Industrial Relations Act[73] which repealed the Trade Disputes Acts of 1906 and 1965. In the history of British labour statutes, the Industrial Relations Act 1971 was a conspicuous failure. The whole operation of the Act pivoted on the fact that unions should be registered.[74] The unions solidly refused to register and this severely crippled the application of the Act. The Act is interesting because it was the first attempt at a form of labour code in Britain which borrowed many North American concepts such as strike ballots, cooling-off periods pending a strike and unfair industrial practices.[75] The 1971 Act was repealed when the Conservative Party lost office in 1974. The Labour Government passed the Trade Union and Labour Relations Act 1974 (T.U.L.R.A.) which re-enacted the immunities from liability the unions had enjoyed prior to 1971. The sections relevant to trade union liability in tort are sections 13 to 17 and section 29. These are set out in full in Appendix 1. Section 13 restored the immunity from certain tortious actions if a person was acting "in contemplation or furtherance of a trade dispute". Section 14 restored the immunity of trade unions from actions in tort. Section 15 appears to state a positive right to picket peacefully at places other than a person's private home. Although the section is expressed in positive terms it was doubtful that the courts would recognize it as being supreme over the criminal law or the law of nuisance. Section 17 relates to the granting of interlocutory injunctions and will be explained in the next section of this paper.

Section 29 provided that for a trade dispute to exist it had to be connected with one or more or a given list of items. As will be shown in Chapter 3 the apparently exhaustive definition of terms in section 29 did not prevent the Court of Appeal from introducing new tests as to whether a trade dispute existed or not.[76] These new tests made it difficult to predict whether industrial action would be protected as it was never clear what test the Court might enunciate next. Once free of the golden formula the Court could continue to develop the common law.

(3) The Development of the Law Relating to the Granting of Interlocutory Injunctions in Labour Disputes

(a) Background

As described above, when trade unions first came into existence their activities were treated as criminal in nature. In the last half of the nineteenth century membership of trade unions grew considerably, as did the scope of their activities. Employers sought a method whereby the activities that constituted a threat to the operation of their businesses could be halted. In a few cases[77] injunctions were successfully obtained from the courts to halt industrial action.

Before considering how the remedy of the injunction came to be applied to labour disputes it is worthwhile to examine the different types of injunctive order that may be obtained from the courts. An injunction has been defined as[78] "...a form of judicial relief whereby the Court orders a party to proceedings to refrain from doing specified acts (a restrictive injunction) or to do certain specified acts (a mandatory injunction)." In the context of labour disputes, an employer is normally applying for a restrictive injunction. The injunction may be applied for at an interlocutory stage of a legal action. The interlocutory injunction is intended to preserve the status quo pending the final determination of the legal action. The plaintiff may seek a perpetual injunction at trial of the action. In extreme cases the plaintiff may apply for a quia timet injunction before a legal action has even been commenced. The latter form of application is appropriate where the plaintiff fears some immediate damage to his property or rights.

The injunction had originally been a remedy of the Court of Chancery to protect property rights. In Springhead Spinning Co. v. Riley[79] the defendant union members by means of placards and leaflets were persuading others not to work for the plaintiff while a dispute was going on. Malins V.C. having held that these actions amounted to common law and statutory crimes, acknowledged that the court had no jurisdiction to restrain them. However he went on to say[80]

> '...that the court will interfere to prevent acts amounting to crime if they do not stop at crime, but also go to the destruction or deterioration of the value of property.

and[81]

> ...there are here rights of property quite sufficient to found jurisdiction in this court.

The property in question was the value and goodwill of the plaintiff's business and the test of granting the injunction was whether irreparable damage would be caused to this property otherwise. The injunction was granted. Although the remedy was not widely used in trade dispute cases until the beginning of the twentieth century, the principles upon which the injunction was founded in Springhead Spinning Co. endured.

The transition from injunctions granted to protect property from trespassers or theft, to interlocutory injunctions granted in the midst of a labour dispute to protect an employer's property is not as clear as Malins V.C. would have us believe. For example, in the case of a dispute over mining rights in a certain area, even if one party was prohibited by injunction from mining the area, there would still be an issue worth taking to trial and a certain amount of justification for keeping the status quo until final judgment. In a labour dispute, if the employees cannot carry on with their industrial action, the impetus is lost, the dispute is very often lost and there is no issue to go to trial.

The practice readily adopted by the judiciary of granting an equitable remedy to cases of labour disputes, was sanctioned by statute in 1873. In that year the Judicature Act[82] fused the Courts of Equity and the common law. Section 45 of the Act gave a court power to grant an interlocutory injunction when it appeared to the court to be just or convenient to do so. Acting within that statutory authority the courts could then grant injunctions with little or no reference to equitable principles. The vague words "just or convenient" were a clear invitation to judges to formulate their own policies as to the application of these words.

The early reported cases show that the granting of interlocutory and final injunctions very quickly became normal practice in labour dispute cases. At least one commentator has speculated that there were perhaps more cases where injunctions were granted in the midst of a labour dispute which were not reported.[83] Statutory restrictions did not impinge on the granting of interlocutory injunctions in labour disputes in Britain until 1974.[84] Following the Judicature Act in 1925 the judges were free to develop their own jurisprudence as to the circumstances in which it would be appropriate to impose an interlocutory injunction.

(b) American Cynamid v. Ethicon[85]

In the context of the civil law the injunctive remedy was most often used to curtail a strike or dispute where the union was found not to be[86] "acting in contemplation or furtherance of a trade dispute." In deciding whether it was "just or convenient" to grant an interlocutory injunction the judiciary would traditionally ascertain if the plaintiff had a prima facie case to proceed to trial. Having established that the plaintiff did have a prima facie case the court would then consider the balance of convenience. The balance of convenience test has been defined as requiring,[87]

> ...the court before granting interlocutory relief to weigh the harm the plaintiff will suffer if he is denied relief, assuming that after a full trial it will appear he is entitled to it, against the harm the defendant will suffer if the plaintiff is granted interlocutory relief, assuming that after a full trial it will appear he is not entitled to it.

The test is also sometimes expressed as requiring the plaintiff to show that he is in danger of suffering "irreparable" harm. In practice however the courts tended to concentrate on the monetary aspect of the harm likely to be suffered. The intangible effect that an interlocutory injunction would have on the conduct of a strike was very rarely placed above the financial losses that an employer would suffer if a strike occurred. In Stratford v. Lindley[88] Lord Pearce said[89]

> The question now to be decided is whether the plaintiffs have made out a prima facie case. If they have done so, there are strong reasons which make this a clear case for maintaining the status quo until the trial. First, if there is no injunction, very great damage will be done. Secondly, the damage will be irreparable since the defendants admittedly cannot pay the damages if they lose the case. Thirdly, an injunction will not cause any damage to the defendants. If it turns out that the plaintiffs have no remedy, the only inconvenience that the defendants will have suffered is a delay of some months in implementing their scheme for putting pressure on Bowker and Young by damaging the plaintiffs and thereby enhancing or maintaining their trade union prestige as against the rival trade union.

In a study on the practice of the High Court in granting labour injunctions since the Second World War until 1971, the authors concluded that the practice and procedure adopted by the courts in this period led to a very low standard of proof being required by plaintiffs to establish a prima facie case and irreparable damage.[90] There was a corresponding disregard for the interests of the defendant. In many cases interlocutory injunctions were granted following an ex-parte application by the plaintiff. This procedure allowed the plaintiff to appear in court alone on very short notice and present evidence by way of affidavit. In interlocutory proceedings affidavits can include statements of information and belief if they are supported by the sources and grounds upon which they are based. Cleverly drawn affidavits can avoid the necessity to state the basis of the information. Even an inter partes hearing is often based on affidavit evidence alone which ensures that the action is nothing like a full trial, particularly in view of the limited time to prepare.[91]

In 1974 the Trade Union and Labour Relations Act[92] (TULRA) was passed. Section 17 of TULRA dealt with the criticisms that had been made of the practice of granting ex-parte orders in cases of labour disputes. The full text is set out in Appendix 1 and it will be seen that section 17(1) provides that where an ex-parte order is sought, the court should, before granting the order, ensure that all reasonable steps have been taken to notify the defendant if the latter was likely to raise as a defence that he was acting in contemplation or furtherance of a trade dispute. Under other sections of TULRA this was a statutory defence to certain actions in tort.

Section 17(2) was not added until 1976. The content of the section was enacted in an effort to deal with the problems that arose as a result of the House of Lords decision in the patents case of American Cynamid v. Ethicon.[93] Through Lord Diplock the House stated that there was no legal rule that the plaintiff must establish a prima facie case when applying for an interlocutory injunction. The court should only consider that there is a serious matter to be tried and then move on to consider the balance of convenience. The merits of each party's case was the last thing to be considered if everything else between the parties was equal. The Ethicon case involved a question of patents, but the problem that the reasoning posed for labour disputes was immediately spotted by Lord Denning M. R. in the case of Hubbard v. Pitt.[94] The latter case was also not a trade dispute but involved picketing by groups of social workers outside the plaintiffs' real estate offices to protest about "gentrification of the area". The majority of the Court of Appeal found that the plaintiffs had a prima facie case of obstruction of the highway.

Further the balance of convenience was in favour of the plaintiffs as their business was affected.

In a strong dissent Lord Denning said that,[95]

> ... if an interlocutory injunction is granted, it will virtually decide the whole action in favour of the plaintiffs, because the defendants will be restrained until the trial (which may mean two years or more) from picketing the plaintiffs' premises, by which time the campaign will be over. It is true that the plaintiffs will have to give an undertaking in damages, but that will be of no use to the defendants, seeing that they will not suffer any pecuniary damages but only be prevented from continuing their campaign in this way.

Therefore Lord Denning argued in Hubbard v. Pitt[96] that these special factors required that the court evaluate the nature of each party's case before granting the injunction. This is surely a valid argument in respect of injunctions in labour disputes. If there is a hint of possible damage to the employer's business, the balance of convenience will always be with the plaintiff, even if the defendant's conduct is perfectly legal. Further, in trade dispute cases where the defendant might have a statutory defence available under TULRA, the court would not consider the defence in an application for an interlocutory injunction as the process would involve considering the merits of the case.[97]

In an effort to remedy the situation, the Employment Protection Act[98] in 1975 added a new subsection to section 17[99] .

> It is hereby declared for the avoidance of doubt that where an application is made to a court, pending the trial of an action, for an interlocutory injunction and the party against whom the action is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that

> party's succeeding at the trial of the action in establishing the matter or matters which would, under any provision of section 13, 14 or 15 above, afford a defence to the action.

Perhaps Lord Denning had been sympathetic to the demonstrators in Hubbard v. Pitt[100] because they represented "the little man" against a powerful business - a position he often took in other cases. Whatever the reason, this attitude did not seem to apply when he came to consider labour dispute cases after section 17(2) was passed. In Beaverbrook Newspapers v. Keys[101] where a dispute threatened publication of newspapers, Lord Denning M.R. "had regard" to s.17(2) as the section instructed but decided to grant the injunction on the basis of the public interest. It seemed that the public would be greatly damaged if not in receipt of the newspaper. Indeed it is a shortfall of section 17(2) that it does not require the court to arrive at any particular conclusion after it has had regard to the strengths of each case. By introducing the new element of the public interest the court could easily override the statutory requirements[102]

> It seems to me that the public interest is the overriding consideration. I put on one side the damage to either party or the convenience or inconvenience to either of them. To my mind the public should not be made to suffer at the hands of the contesting parties.

In Star Sea Transport Corporation of Monrovia v. Slater[103] Lord Denning M.R. granted an injunction to the plaintiff even though there was "a very arguable point of law"[104] involved. The case involved the campaign of the International Transport Federation against ships flying flags of convenience and paying crews poor wages. Into this set of facts

Lord Denning M.R. introduces the interest of "the public at large" who suffer damage because a ship is delayed from leaving port.

The public interest was therefore playing a considerable role in the final decisions of some cases. Whether it is desirable for the public interest to be taken into account in labour dispute cases should depend on the facts of each case. That is to say that the facts of the case should be fairly extreme in the way the public interest is affected before such a malleable concept plays such an important role. The term "public interest" can be used to protect many things whilst not directly naming them, such as the interest of the plaintiff. It is of the nature of a trade dispute that the public interest may be affected or inconvenienced in some way. That is part of the price of industrial democracy and applies as much when an employer locks out as when a union strikes. In the absence of extreme circumstances the public interest should not be the balancing factor in granting an injunction in a trade dispute case; particularly where the merits of each parties case have not been adequately considered.

It will be shown in Chapter 3 how the law relating to the granting of interlocutory injunctions was developed further by Lord Diplock in 1979 in the case of NWL v. Woods.[105] The next section in this chapter discusses the development of the law relating to the criminal liability of pickets. Injunctions have also been used to enforce the criminal law and these cases will be discussed following an outline of the relevant criminal law.

III The Criminal Liability of Pickets

(1) The Conspiracy and Protection of Property Act 1875

It has already been noted how section 3 of the 1875 Act[106] freed those acting in contemplation or furtherance of a trade dispute from criminal liability for conspiracy. Section 3 has since been replaced by other provisions,[107] but section 7 which defined picketing offences is still relevant today. It is not possible to gauge accurately how much section 7 has been used over the years to restrict picketing as until 1986 it was not an arrestable offence.[108] Persons ultimately charged under section 7 would have been arrested on another charge. The trial would occur in the Magistrates court where cases are rarely reported. Section 7 provides that,

> Every person who, with a view to compel any person to abstain from doing or to do any act which that other person has a legal right to do or abstain from doing wrongfully and without legal authority,-
> 1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or
> 2. Persistently follows such other person about from place to place; or
> 3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or
> 4. Watches or besets the house or other place where such other person resides or works or carries on business, or happens to be, or the approach to such house or place; or
> 5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as herein - after mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. Attending at or near the house or place where a person resides, or works or carries on business or happens to be, or the approach to such house or place in order merely to obtain or

> communicate information, shall not be deemed as watching or besetting within the meaning of this section.

The proviso at the end of section 7 was a milestone for trade unionists in its establishment of a freedom to picket peacefully. However the Court of Appeal was shortly to dispel any notion that the section could be read clearly and free of ambiguity. Two conflicting decisions on the construction of section 7 which have never been adequately reconciled are Lyons v. Wilkins[109] and Ward Lock v. Operative Printers Assistants Society.[110]

(a) Lyons v. Wilkins

Lyons v. Wilkins and Ward Lock involved similar issues: the picketing of a primary employer for an increase in wages. In Lyons v. Wilkins there was also a strike and picketing of a supplier. Both legal actions were based on the penal sections of the 1875 Act and particulary section 7(4) which contains the offence of watching and besetting. In both actions it was agreed that the picketing itself was peaceful and not in excessive numbers. Both actions were commenced in the civil courts and the plaintiffs requested the remedy of an injunction to enforce a penal statute. Lyons v. Wilkins[111] came before the Court of Appeal twice. Initially the plaintiffs were granted an interlocutory injunction. This decision was appealed,[112] as was the judgment after trial[113] which granted the plaintiffs a perpetual injunction. Both appeals, from the interlocutory order and judgment, were lost by the union.

In the appeal from the interlocutory injunction Lindley L.J. held that the pickets were watching and besetting the employer's premises and that this was a civil nuisance amounting to persuasion not to work. The conduct was therefore not protected by the proviso to section 7 which referred only to the peaceful communication of information. Lindley L.J. attached a great deal of importance to the word "compel" in the first part of section 7. He used 'compel' to interpret the proviso at the end of section 7. He found that if the pickets were compelling a person not to work under the guise of communicating or obtaining information, then that activity fell outside the proviso and became "wrongful and without legal authority". The effect of Lindley L.J.'s interpretation was to rob the proviso of any real effect so far as picketing activity was concerned. Any information that the pickets communicated about the dispute could certainly be viewed as seeking to compel workers not to cross a picket line. However one assumes that the legislature intended to allow some form of demonstration by pickets by enacting the proviso of section 7. The judgment of Lindley J.J. does not even consider any positive aspects of the proviso.

By the time of the appeal from the final judgment Lord Lindley had been appointed Master of the Rolls. In that judgment he further developed his theory of the meaning of section 7. In his view the words "wrongfully and without lawful authority" meant that the offences described in the section were unlawful per se and there was no need to prove anything beyond the offence itself.[114]

> But it is not necessary to show the illegality of the overt acts complained of by other evidence than that which proves the act themselves, if no justification or excuse for them is reasonably consistent with the facts proved.

(b) Ward Lock v. Operative Printers' Assistants Society[115]

Ward Lock was heard by a differently constituted Court of Appeal. Only Vaughan Williams L.J. heard both Lyons v. Wilkins and Ward Lock. In Ward Lock Vaughan Williams L.J. held that "wrongfully and without lawful authority" meant that there had to be some independently unlawful act committed to take peaceful watching and besetting out of the proviso. He did not specifically disagree with the proposition of Lindley M.R. that picketing could constitute a nuisance, but in his view peaceful watching and besetting without evidence of any unlawful conduct did not amount to a nuisance. This was so even though he found evidence that the defendants were inducing workmen to join the union and that the union was trying to persuade the employer to employ only union members. In his view section 7 only made criminal certain offences which had previously existed as forms of civil nuisance and did not expand those offences in any way.

Vaughan Williams L.J. does not mention the Lyons case, but Moulton L.J. does.[116] The latter is at great pains to say he is following the authority of Lindley M.R. but a close examination of his judgment reveals that he is in fact distinguishing the former case. Moulton L.J. explains that Lindley M.R. emphasised the word "compel" in section 7, so that the act of compelling became wrongful in itself. Moulton L.J. placed more emphasis on the word "wrongfully" in section 7 because in his opinion the legislature included the word for a purpose. This purpose was to find liability under section 7 only when an act wrongful in itself had been committed by a person who was watching and besetting. The common thread which Moulton L.J. seems to find in his judgment and that of Lindley M.R. is that section 7 is being applied to acts wrongful in themselves. However Lindley M.R. found the wrongful act in section 7 itself; the act of compelling. Moulton L.J. and the other members of the Court of Appeal in Ward Lock found that the wrongful act has to be found independently of section 7. It cannot be said therefore that Moulton L.J. is following the authority of Lindley M.R.

What then is the status of these two conflicting decisions? The question is not one of merely historic interest. Section 7 is not restricted by its terms to trade disputes and therefore picketing cases not concerned with current employment legislation still have to consider the decisions of Lyons v. Wilkins and Ward Lock.[117] Further, the Public Order Act 1986[118] has made section 7 an arrestable offence which cannot help but ensure that the section is used more often in current times. The Canadian Criminal Code has a section based entirely on section 7[119] to deal with picketing offences. Although not much use has been made of the Canadian section in modern times it could always be called back again into play, as was section 7 of the Conspiracy and Protection of Property Act 1875 in the miners strike in Britain in 1984.[120] Finally, the cases illustrate in their differing interpretations the fundamental question which has continued to divide judges; that is, when does peaceful picketing go beyond merely communicating or obtaining information and become conduct that should be enjoined? In later cases this issue was to be discussed in many different ways. Often the Lyons case and Ward Lock would not be cited but the spirit of the arguments from these two cases lived on.

At its most basic, the choice between the two cases is one of a decision opposed to the picketing activity of a union (Lyons v. Wilkins) and a decision which is more liberal as to how far such activity should be permitted (Ward Lock). The differences between the two cases have never been properly reconciled[121] and as cases of equal authority, they remain for judges to follow as their conscience dictates.

(c) Section 2 Trade Disputes Act 1906[122]

A further attempt to limit the scope of Lyons v. Wilkins was made by section 2 of the Trade Disputes Act 1906. Section 2 of the Act repealed the proviso to section 7 of the Conspiracy and Protection of Property Act 1875. Subsection 2(1) of the 1906 Act replaced the proviso with the following

> It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or comes on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

The subsection did go some way towards resolving the differences between Lyons v. Wilkins and the Ward Lock case in favour of the latter. By specifically including "peaceful persuasion" as permissable conduct the subsection reduces the importance of the word "compel" in section 7 of the 1875 Act. However, although Lyons v. Wilkins and Ward Lock were also reconciled on the point that peaceful picketing could constitute a nuisance there was still no measure of agreement on what degree of conduct was necessary. The new subsection also did not resolve the issue of whether the offences in section 7 of the 1875 Act were unlawful per se or whether they had to be accompanied by a separately unlawful act.

Some support for the Ward Lock view was expressed by the Court of Appeal in 1922 in Fowler v. Kibble.[123] The Court held that an independently unlawful act was necessary to find liability for those acts listed in section 7 of the 1875 Act. However the facts of the case did not involve picketing so that the permissable limit of peaceful picketing was not discussed. When the 1906 Act was repealed, section 15 of TULRA[124] re-enacted section 2 of the 1906 Act.

(d) Hubbard v. Pitt[125]

Hubbard v. Pitt has already been referred to in the context of the granting of interlocutory injunctions. The case was heard by the Court of Appeal in 1975 and is also an example of a non trade dispute case where Ward Lock and Lyons v. Wilkins were discussed. The demonstrators outside the real estate agent's office were situate on the highway. Stamp and Orr L.JJ expressed a preference for the Lyons v. Wilkins approach that the picketing involved a nuisance even though no unlawful actions were being committed. However it is not clear whether the type of nuisance under discussion was public or private. Lord Denning M.R. in his dissent, favoured the reasoning in Ward Lock that without acts otherwise unlawful the picketing was not a nuisance. One modern writer has called the choice between the two older cases "the liberal dilemma".[126]

> ...how [to] resolve the contradictions entailed in allowing picketing and public protest to be effective without at the same time falling foul of the law.

Quite correctly the same writer has also pointed out that despite the acclaim with which the liberal judgment of Lord Denning was greeted by civil libertarians, it was the minority judgment.[127] The judgments of Stamp and Orr L.JJ which concentrate on the actions of the demonstrators rather than their purpose is the yardstick by which future cases will be measured, unless an appeal reaches the House of Lords.

(e) Criminal Intimidation

Section 7(1) of the Conspiracy and Protection of Property Act 1875 provides for the offence of criminal intimidation. Earlier in this chapter it was shown how the Trade Disputes and Trade Union Act of 1927 had adopted a very wide definition of civil intimidation which was later repealed.

In 1974 the Court of Appeal adopted a very similar definition of intimidation as enunciated in the 1927 Act in the criminal case of R v. Jones.[128] Three building union strike leaders were charged with conspiracy to intimidate after taking part in picketing activities. They were convicted and on appeal James L.J. said that intimidation,[129]

> ...includes putting persons in fear by the exhibition of force or violence or the threat of force or violence, and there is no limitation restricting the meaning to cases of violence or threats of violence to the person.

Such a wide definition ensured that the appeals in R v. Jones were dismissed.

In 1977 the Criminal Law Act[130] was passed which abolished the common law crime of conspiracy. The crime was replaced with a statutory offence which did not apply to summary offences (cases heard by magistrates only) carried out in contemplation or furtherance of a trade dispute. The crime of conspiracy to intimidate has not reappeared in the industrial relations arena since R v. Jones; however the offence of intimidation still exists in section 7 of the Conspiracy and Protection of Property Act 1875.

(f) Injunctions to Enforce the Criminal Law

As can be seen from the cases discussed in the previous sections injunctions can be granted to enforce the criminal law. Springhead Spinning Co. v. Riley[131] was such a case. Malins V.C. said as follows,[132]

> The truth I apprehend, is, that the Court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of the property.

In Lyons v. Wilkins[133] the plaintiff sought an injunction to restrain the defendants from committing offences under the Conspiracy and Protection of Property Act. Lindley L.J. thought that it was not good enough to leave the defendants[134] "to the summary jurisdiction of the Magistrate". The danger of damage to the plaintiff's property and trade, in his view, justified the imposition of an injunction.

In Ward Lock[135] the plaintiff was making a similar application based on section 7 of the 1875 Act. Vaughan Williams L.J. took a different view to Lindley L.J. of the purpose of the 1875 Act. In the opinion of Vaughan Williams L.J.,[136]

> The Legislature, by the Act of 1875, gave in respect of some of these nuisances, as to which there was a civil remedy, a summary remedy by summons before a Magistrate for acts done for which previously there was only a civil remedy.

This would seem to imply that had Vaughan Williams L.J. found that the nuisance of watching and besetting was proven, he would not have based the granting of an injunction on a right of property. In his opinion the nuisance was already established in the civil law.

The House of Lords held in 1978 in Gouriet v. Union of Post Office Workers[137] that the consent of the Attorney General was required before a private individual could apply for an injunction to enforce the criminal law. This statement of the law was qualified as their Lordships held that an individual would have standing to apply for an injunction where a private right of his was interfered with by the breach of the criminal law, or he thereby suffered special damage. There is still some confusion as to the extent of the plaintiffs' rights which must be interfered with.[138] Whatever the extent of the plaintiffs' rights it now appears to be settled that in certain circumstances a civil action is available to a plaintiff to enforce the criminal law. So far as picketing is concerned such a development is extremely important. It means that in many picketing cases the distinctions between the civil and the criminal law become quite blurred. The grounds upon which a plaintiff may seek an injunction are considerably widened. The subject of injunctions to enforce the criminal law will be discussed further in Chapter 3 in relation to the case of Thomas v. N.U.M.[139]. The following sections in this chapter discuss the origins of public order offences with which pickets are regularly charged.

(2) Obstruction of a Police Officer

(a) Background

The most general of the public order offences is that of conduct likely to cause or provoke a breach of the peace. In the early 1800s several local enactments provided for a crime of threatening and abusive behaviour.[140] It was not until 1936, when clashes occurred in the east end of London between Fascists and those who opposed them, that a statute was introduced, which was effective nationally.[141] This was the Public Order Act, section 5 of which provided that,

> Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.

Exactly what type of conduct the section was intended to prohibit has been the subject of debate since its enactment. Fears have also been expressed that enthusiastic use of the section by the police can and has led to a diminution of freedom of speech.[142] Such views were expressed in relation to non trade dispute cases, but the criticism is also valid in relation to industrial picketing.

Unlawful assembly was a common law crime, as were the offences of riot and rout. The three offences can be traced back at least to the sixteenth century.[143] Archbold defines unlawful assembly as[144]

> ...an assembly of three or more persons:
> (a) with intent to commit [or to encourage the commission of] a crime by open force; or
> (b with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

Beatty v. Gillbanks,[145] a case heard by the Court of Appeal in 1882, is still a good authority for determining whether a group of people is liable for unlawful assembly. The case involved members of the Salvation Army who were parading the streets. Another opposition organization also paraded the streets and where the two groups collided there was some degree of disorder. On appeal against conviction of the members of the Salvation Army the Divisional Court considered the offence of unlawful assembly. Field J. concluded that it was the unlawful actions of the opposition group that caused the disturbance. He reached this conclusion by asking whether it was the "natural and necessary consequence" of the acts of the Salvation Army to produce a disturbance.[146] He found therefore that the members of the Salvation Army could not be convicted of unlawful assembly.

(b) Duncan v. Jones[147]

Duncan v. Jones is a case that is often compared with Beatty v. Gillbanks, but the former case actually arose in quite different circumstances.[148] Mrs. Duncan was charged with wilfully obstructing a constable in the execution of his duty. This had been an offence under section 38 of the Offences Against the Person Act 1861.[149] The same offence was later to be found in section 2 of the Prevention of Crimes Amendment Act 1885,[150] under which Mrs. Duncan was charged for attempting to make a public speech outside an Unemployed Workers' Training Centre when a police officer had asked her not to. The conviction of Mrs. Duncan was upheld by the Divisional Court on the grounds that it was reasonable for the constable to have apprehended a breach of the peace based on knowledge of a similar meeting Mrs. Duncan had conducted one year earlier. The difference between Duncan v. Jones and Beatty v. Gillbanks would appear to be that in the former case the meeting itself was suspect whilst in the latter the meeting was attacked by outsiders.[151] However one commentator has suggested[152] that Duncan v. Jones marks the point when police powers were effectively extended by using the offence of wilfully obstructing a police officer in the execution of his duty. In previous cases although the offence of obstruction had existed the police believed they had to proceed by way of charging unlawful assembly.[153]

> In 1882 and long after 1885, the police and the judges could see no difference between the scope of the two offences; the view was taken that unless an assembly was unlawful, the police had no duty to disperse it, and hence the offence of obstruction (or resisting or encouraging to resist) the police when in the execution of their duty could not be proved without first proving an unlawful assembly.

The implications of the decision in Duncan v. Jones have been far reaching. A great deal of discretion is given to the police officer to ascertain whether he reasonably apprehends that a breach of the peace will occur. Further it seemed that for a time the police themselves believed that there was a general power of arrest without warrant for obstructing the police. It is now settled that the power of arrest only arises if the alleged offender has obstructed the police officer by causing or being likely to cause a breach of the peace, or that the police officer was acting in the execution of his duty and on reasonable grounds believed that the alleged offender was wilfully obstructing him and the obstruction was likely to cause the breach of the peace.[154] However, even though the power of arrest has been clarified, considerable discretion is still left to the individual police officer. The offence of obstructing a police officer in the execution of his duty is now found in section 51 of the Police Act 1964.[155]

(c) Obstruction and Picketing

When the practice of picketing is considered in relation to public order offences additional considerations come into play. There is no statutory right of freedom of speech or assembly in Britain, but since 1906 successive civil statutes have given a limited right to picket. It is interesting to look at how the civil rights of pickets are curtailed by the criminal law. Pickets can be acting within the confines of the civil law statutes and yet still be arrested for a public order offence.

In 1960 the Divisional Court heard an appeal against conviction in the case of Piddington v. Bates.[156] A picket had questioned the authority of a police officer who had stipulated that two pickets at the entrance of a printing firm was sufficient. The facts in the case report state that, "the appellant then pushed gently past the respondent and was gently arrested." The appellant was arrested for obstructing a police constable in the execution of his duty. The reason that the constable had limited the number of pickets to two was that he feared a breach of the peace might arise if larger numbers were present. One obvious distinction of this case from Duncan v. Jones was that in Piddington v. Bates some physical contact took place. One commentator has suggested that the assault was manufactured by the police officer.[157] This is rather a harsh judgment to make upon reading the case, without the benefit of also hearing the evidence. However, the point made by Daintith does illustrate how potentially easy it would be for police officers to abuse their powers of arrest for wilful obstruction when acting in the course of duty.

Lord Parker C.J. gave judgment in the appeal. He set out section 7 of the Conspiracy and Protection of Property Act 1875 and section 2 of the Trade Dispute Act 1906 which, at that time, formed the limits of the civil right to picket. He supported the limitation imposed on the pickets by the constable because the number of pickets was greater than the number of workers in the building. There were therefore reasonable grounds to apprehend that a breach of the peace might occur. However he seems to imply that whatever the constable would have decided to do to limit the picketing would not have been interfered with by a court.[158]

> For my part, I think that a police officer charged with the duty of preserving the Queen's peace must be left to take such steps as, on the evidence before him, he thinks are proper.

The above statement highlights one of the difficulties that face any defendant tried on a summary charge in a magistrates court. Experience has shown that unless there are glaring inconsistencies in police evidence, magistrates will very rarely reject police evidence.[159] Policemen are normally given permission to refer to their notebooks, if the notes were made within sufficient proximity of time to the commission of the alleged offence, to "refresh" their memories. The acceptance by magistrates of police evidence is one of the reasons that lawyers will advise their clients to elect for jury trial in the Crown Court if possible. However most public order offences are summary offences and have to be tried in the magistrates court. In picketing cases the situation is also a little different in that any available witness evidence for the defendant will, in all likelihood, be fellow pickets.

The battle lines are therefore clearly drawn in the courtroom with no impartial witnesses as there might be for example in the case of a driving offence.

The statement of Lord Parker C.J. quoted above illustrates that the appeal court will very rarely overturn the decision of the magistrates court which has given a decision based on the oral evidence. The statement also illustrates the degree of latitude that the courts will leave to the police in exercising their powers.

Piddington v. Bates therefore displays some disturbing trends so far as the rights of pickets are concerned. A command is issued in the execution of a constables' duty based upon a reasonable apprehension that a breach of the peace will occur. If the picket does not obey the command he can be arrested for obstructing the constable in the execution of his duty. The reasonableness or not of the police officers' apprehension that a breach of the peace will occur is not to be judged. The discretion is left entirely in the hands of the police officer. Under these circumstances how could anyone arrested in the same situation as Mr. Piddington ever maintain a successful defence?[160]

(d) Obstruction and the 1906 Act

Section 2 of the Trade Disputes Act 1906 sets out the peaceful picketing proviso to section 7 of the Conspiracy and Protection of Property Act 1875. The relationship between the civil right to picket and the offence of obstructing a police officer in the execution of his duty has been commented upon in varying degrees by the courts.

In Piddington v. Bates[161] Lord Parker C.J. set out section 7 of the 1875 Act with section 2 of the Trades Dispute Act. He then goes on to discuss whether the constable could reasonably anticipate that there was going to be a breach of the peace. No further reference is made to section 2 and no attempt is made to reconcile the two aspects of law involved. The inference can be made that it is the police who decide when conduct falls within section 2 or not.

The Industrial Relations Act[162] was passed in 1971 which repealed the Trade Disputes Act 1906.[163] Section 134 of the 1971 Act gave a right to picket in the following terms.

> (1) The provisions of this section shall have effect where one or more persons (in this section referred to as "pickets"), in contemplation or furtherance of an industrial dispute, attend at or near -
> (a) a place where a person works or comes on business, or
> (b) any other place where a person happens to be, not being a place where he resides, and do so only for the purpose of peacefully communicating information to him or peacefully persuading him to work or not to work.
> (2) In the circumstances specified in the preceding subsection, the attendance of the pickets at that place for that purpose -
> (a) shall not of itself constitute an offence under section 7 of the Conspiracy and Protection of Property Act 1875 (penalty for intimidation or annoyance by violence or otherwise) or under any other enactment or rule of law, and
> (b) shall not of itself constitute a tort.

The terms of section 134 were far more indicative of a positive right to picket than the terms of section 2 of the 1906 Act. During the time when the Industrial Relations Act was in force in the early 1970s there was much union opposition to the Act as a whole and industrial unrest. It was therefore inevitable that the 'right' to picket in section 134 would sooner or later come into conflict with the criminal law.

Kavanagh v. Hiscock[164] was an appeal against conviction for assaulting a police officer in the execution of his duty. The defendant was arrested when he had tried to break through a police cordon to speak to the driver or passengers of a coach going into a building site. The police had planned to allow for pickets to speak to those on the coach, but at the last minute cleared the roadway completely. The defendant was very angry at what he perceived to be an infringement of the rights of the pickets. The Divisional Court upheld the conviction on the grounds that if the police had a reasonable apprehension that a breach of the peace might occur, they were then justified in clearing the street. Lord Widgery C.J. stated that section 134 did not confer a 'right'.[165]

> ...it is inapt to describe that which is conferred by s.134(2) as a right. I think it is misleading, and I think the word used by Lord Salmon, 'immunity' is a much better word, because when one looks at the wording of s.134(2) again, it is quite clear that what is being conferred is immunity from proceedings in certain circumstances.

However, whether one describes the contents of section 134 as 'rights' or 'immunities' the terms of the section are quite clear. Section 134(2) states that when a person is conducting himself in accordance with section 134(1), that conduct will not constitute an offence. A policeman cannot arrest for obstruction whilst in the execution of his duty unless there is an apprehension of a breach of the peace. In Kavanagh v. Hiscock the Divisional Court was merely perpetuating the law as stated in Duncan v. Jones. To do this in the case of picketing it was necessary to get around section 134 which they did by finding that the defendants' conduct was outside the terms of section 134(1). Any picket line which involved more than a handful of demonstrators could easily be found to be outside the terms of section 134(1). It was said that such a large group of pickets was not intended to peacefully obtain or communicate information or persuade others not to work, but was intended to block the highway and have the potential of causing a breach of the peace. Such an argument ignored the fact that neither section 134 or section 2 of the 1906 Act limited numbers of pickets. Both sections gave rights to the individual pickets. The rights of each individual to be present on a picket line were not even considered by the various levels of judges, or any attempt made to balance those rights against the rights for example of others who wished to use the highway.

(3) Obstruction of the Highway

Another public order offence of relevance to picketing is obstructing the highway. The crime is based on the concept of public nuisance which the Court of Appeal held in 1975 could still be a crime.[166] The statutory offence is now contained in section 137 of the Highways Act 1980 which provides as follows:

> (1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding £50
> (2) A constable may arrest without warrant any person whom he sees committing an offence against this section.

The cases prosecuted under this section have shown that a minimal amount of obstruction for a short time will secure a conviction.[167] Once again the degree of discretion afforded to the police in administering the law is questionable, as is the degree to which section 137 affects the ideal of freedom of assembly. Tynan v. Balmer[168] involved a group of approximately forty pickets who were circulating in a service road to the factory where they normally worked. The leader was arrested when he refused to tell the pickets to stop when requested to do so by a police officer. The leader was subsequently convicted of obstructing the policeman in the execution of his duty. The police had asked the pickets to move on because it was felt that the pickets were obstructing the highway. In actual fact no traffic was using the service road at the time. One picket apparently gave evidence that a few trucks had been stopped at the transport gate, but there was no evidence that any truck had not been allowed to proceed on its way.

The Divisional Court upheld the conviction on the basis that the pickets constituted a common law nuisance as an unreasonable use of the highway. This conduct was not sanctioned by section 2 of the 1906 Act and therefore it was appropriate for the police to move the pickets on. It will be remembered that section 2 allowed pickets to attend peacefully to obtain or communicate information or to persuade others not to work.

Widgery J. accepted the finding of fact of the magistrates court that part of the object of the pickets was to cause vehicles to stop.

The above reasoning might be more acceptable if an obstruction of the highway had actually been established. The court was in fact accepting that an anticipated obstruction of the highway was a sufficient basis upon which the constable could arrest for obstruction in the execution of his duty. Peaceful picketing, which at the time of arrest was all that was taking place, was rendered lawful by section 2 of the 1906 Act.

In Broome v. D.P.P.[169] consideration was given to the relationship between the offence of obstructing the highway and section 134 of the Industrial Relations Act. A picket was arrested for obstructing the highway when he stood in front of a truck with a placard. The justices in the magistrates court acquitted the defendant on the grounds that section 134 of the 1971 Act gave him a statutory right to demonstrate in this way. The justices further found that the nine minutes between the time the defendant stopped the truck and the time the defendant was arrested was not an excessive time for the defendant to exercise his rights under section 134.

The Divisional Court substituted a conviction for the acquittal and the defendant appealed to the House of Lords. Unanimously the House dismissed the appeal. Their Lordships held that Mr. Broome's activities had gone beyond the area of permissable activity outlined in section 134 in endeavouring to compel the truck driver to stop and listen to him.

Viscount Dilhorne encapsulates the problem that the pickets faced in the following statement.[170]

> It may be that unless the right to picket includes and extends to stopping people against their will, pickets will be unable to exercise their powers of persuasion as they wish. However this may be, the law is, in my opinion clear and section 134 of the Act of 1971 does not, nor did the Act of 1906 or the Act of 1875 give them the right to do so.

Lord Reid went further than his fellow judges and made some remarks concerning mass picketing. He agreed that if a picket had a purpose beyond those set out in section 134 his presence on the highway would become unlawful. Lord Reid went on to say that if pickets were gathered in unreasonably large numbers it would be easy to infer that their purpose was to prevent free passage which would be unlawful. Each picket may therefore individually be acting within the terms of the civil statute but his action would be judged by the collective nature of the group.

In the modern age the problems for the picket on the highway have increased because many workers speed past picket lines in cars and trucks. The pickets are kept back by the police for their own safety and to minimise disruption. The pickets become frustrated with the police and arrests may be made. The difficulties facing pickets who wished to communicate with those in vehicles raised the issue of whether pickets should have the right to stop vehicles to communicate with those inside.[171] The Royal Commission on Trade Unions and Employers' Associations rejected this proposal because,[172]

> ...it would be impossible to define such a right in terms which would avoid considerable obstruction to the highway and serious risk of personal injury to the pickets themselves.

IV Conclusion

It can be seen from the foregoing how the law relating to picketing has changed little in emphasis since the beginning of the twentieth century. Statutes have never proclaimed picketing as a right. In reality all statutory provisions relating to picketing are limitations on the fundamental freedoms of expression and movement. As time has gone on the case law has narrowed even further the statutory freedom to picket.

The statutory provision first contained in section 2 of the Trades Dispute Act 1906 and then in section 15 of TULRA, appears to be very wide in principle. A person may picket provided that they attend merely to peacefully obtain or communicate information or to peacefully persuade a person to work or not work. In practice the freedom is very easily restrained. Employers can do so by obtaining an interlocutory injunction. In Britain the injunction has been used primarily as a weapon against the strike itself. However it follows that if the strike is restrained, any conduct in pursuance of the strike will also be restrained. In industrial dispute cases injunctions will be granted very readily in favour of employers because the rules that the courts have developed for the granting of interlocutory injunctions emphasize the financial losses that will be caused to an employer by a strike and picketing. The courts see the fact that the union will be temporarily halted in its crusade as an intangible factor regardless of the fact that the injunction usually has the effect of ending the dispute in favour of the employer.

Despite attempts by the legislature to protect unions from specific forms of tortious liability (which generally only apply to trade unions anyway), the courts have continued to march ahead of the statutes and find numerous reasons why the statutes do not apply. It may be that the case does not fit the definition of a trade dispute in section 29 of TULRA, or that the statutes do not mention a new area of tortious liability. Whatever the reason, the numerous cases where injunctions are granted in the midst of a labour dispute clearly show that the unions were not really privileged at all under the terms of TULRA.

The other restriction on the operation of section 15 of TULRA is the discretion of the police. The cases such as Broome v. D.P.P., and Piddington v. Bates show that the criminal law can be used to restrict the actions of pickets. At the picketing location the restraint is in the hands of the police who operate their discretion under various summary public order offences. Thus the police can restrict the number and location of pickets quite easily. By the time the cases are dealt with summarily or on appeal the dispute may in fact be over.

Employers can also use the criminal law. The judgments in Lyons v. Wilkins show that the courts can and will grant injunctions to restrain breaches of the criminal law. In non trade dispute cases pickets do not even have the protection of TULRA making their activities even more vulnerable. The pickets in Hubbard v. Pitt were restrained on the basis that they were a nuisance.

The trend in picketing cases seems to be one of considering the rights of those not picketing to be far superior to those picketing. Such an analysis ignores the rights of those people who wish to demonstrate peacefully. The fact that they may be in a minority is not sufficient reason to curtail their activities. The next chapter will examine how far this trend continues in the 1980s.

FOOTNOTES - CHAPTER 2

1. [1899] 1 Ch. 255.

2. (1906) 22 T.L.R. 327.

3. 39 and 40 Geo. III, c.81.

4. Combination Laws Repeal Act Amendment Act 1825, 6 Geo. IV, c. 129. The Act allowed workers to combine only to agree on their own hours or wages.

5. Citrines' *Trade Union Law* (3rd ed. 1967) at p. 7. See also K.W. Wedderburn *The Worker and the Law* (2nd ed. 1965) at 219.

6. 22. Vict. c. 34.

7. Reform Act; 1867 (U.K.), 30 and 31 Vict. c. 102.

8. Royal Commission on the Organization and Rules of Trade Unions and Other Associations 1867-9.

9. 1871 (U.K.), 34 and 35 Vict. c. 31, s. 2.

10. Ibid., s. 3.

11. 1871 (U.K.), 34 and 35 Vict. c. 32, s. 1.

12. 6 Geo. IV, c. 129.

13. 22 Vict., c. 34.

14. 1871 (U.K.), 34 and 35 Vict. c. 32.

15. (1872) 12 Cox. C.C. 316.

16. Ibid. at 338.

17. Supra n. 15 at 347-8.

18. 1871 (U.K.), 34 and 35 Vict. c. 32.

19. 1875 (U.K.), 38 and 39 Vict. c. 86.

20. Except during the period 1971-4 when the Industrial Relations Act 1971 was in effect.

21. The Trade Union Act of 1871 had itself been passed as a result of the decision in Hornby v. Close (1867) 2 K.B. 153 when the court refused to enforce union rules to prosecute an embezzling official. The Act gave the unions an immunity from being in restraint of trade and therefore legality under statute, if not at common law.

22. Supra, n. 19.

23. See Wedderburn The Worker and the Law (2nd ed. 1965) at 222.

24. It should be noted that in this instance the actual decision in R v. Bunn was not reversed as ss. 4 and 5 made it a criminal offence to strike in breach of a contract of service with a public utility or where, as a result of the breach, life or valuable property would be exposed to danger. The defendants in R v. Bunn were sentenced to twelve months imprisonment with hard labour which was later reduced by the Queen on advice of her Home Secretary to four months.

25. For early origin of the tort see I. Christie The Liability of Strikers in the Law of Tort (1967) Industrial Relations Centre, Queens University at 68.

26. [1893] 1 Q.B. 715.

27. [1901] A.C. 495.

28. Ibid. at 529.

29. [1942] A.C. 435.

30. [1981] 2 All E.R. 457.

31. For an early history of this tort see I. Christie supra n. 25 at 108.

32. (1853) 2 E. and B. 216; 118 E.R. 749.

33. Ibid. at 753 (E.R.).

34. Supra n. 26.

35. (1895) 72, L.T. 432.

36. [1905] A.C. 239.

37. Ibid. at 252.

38. See e.g. International Longshoremen's Association v. Maritime Employer's Association [1979] 1 S.C.R. 120.

39. See e.g. Stratford v. Lindley [1965] A C 269.

40. Supra n. 19. See Appendix 1.

41. 1927 (U.K.) 17 and 18 Geo. 5.

42. Supra n. 5 at 25.

43. Trade Union and Trade Dispute Act 1946 (U.K.) c. 52.

44. [1961] 2, All E.R. 825, [1962] 2, All E.R. 579 (C.A.), [1964] 1 All E.R. 367 (H.L.). See C.J. Hamson "A Note on Rookes v. Barnard" (1961) 41, Camb. L.J. 189, L.H. Hoffman "Rookes v. Barnard" (1965) 81, L.Q.Rev. 116, D. Thompson "The Protection of the Right to Work in the Law of Torts" (1963) 41, C.B. Rev. 167, K.W. Wedderburn "The Right to Threaten Strikes" (1962) M.L. Rev. 513, and (1964) M.L. Rev. 257.

45. [1962] 2, All E.R. 579.

46. Ibid. at 600.

47. [1964] 1, All E.R. 367.

48. (13th ed. 1961), ch. 18 at p. 697.

49. [1962] 2, All E.R. 579 at 600.

50. 1965 (U.K.) c. 48.

51. Salmond and Heuston on the law of Torts R.F.V. Heuston (18th ed. 1981) at 356-7.

52. See discussion in Elias and Ewing "Economic Torts and Labour Law: Old principles and new liabilities" (1982) 41, Camb. L.J. 321 at 336-347.

53. See e.g. News Group Newspapers Ltd. v. SOGAT '82 [1986] IRLR 337.

54. 1906 (U.K.) 5 Edw. 7 c. 47.

55. The Taff Vale Railway Company v. The Amalgamated Society of Railway Servants [1901] A.C. 426. For discussions on the case see Citrines' Trade Union Law (3rd ed. 1967) at 16, H. Pelling A History of British Trade Unionism (3rd ed. 1976) at 121-2, Sidney and Beatrice Webb The History of Trade Unionism (2nd ed. 1920) at 600-1, K.W. Wedderburn The Worker and the Law (2nd ed. 1965) at 227-31.

56. Quinn v. Leatham [1901] A.C. 495.

57. Royal Commission Report (1906) Cmnd. 2825.

58. Supra n. 54.

59. Supra n. 23.

60. [1952] Ch. 646.

61. [1965] A.C. 269.

62. [1966] 1 W.L.R. 691 at 700.

63. [1968] 2, Q.B. 762.

64. K.W. Wedderburn "Inducing breach of contract and unlawful interference with trade" (1968) 18, *M.L.Rev.* 440.

65. *Hadmor Productions Ltd.* v. *Hamilton* [1982] I.C.R. 114 and *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.* [1982] A.C. 173.

66. [1969] 2, Ch. 106.

67. Ibid. at 141.

68. *Merkur Island Shipping Corp.* v. *Laughton* [1983] I.C.R. 490.

69. 1974 (U.K.) c. 52.

70. Supra n. 47.

71. Royal Commission on Trade Unions and Employer's Associations 1965-68 Cmnd. 3623.

72. Ibid. paras 855-77.

73. 1971 (U.K.) c. 72.

74. Ibid. ss. 61-95.

75. See C.J. Whelan "On Uses and Misuses of Comparative Labour Law: A Case Study: (1982) 45 *M.L. Rev.* 285.

76. See e.g. *B.B.C.* v. *Hearn* [1977] I.C.R. 685, *Express Newspapers* v. *McShane* [1979] I.C.R. 210.

77. See *Springhead Spinning Co.* v. *Riley* (1868) L.R. 6 Eq. 555, *Collard* v. *Marshall* (1892) 1 Ch. 571, *Trollope and Sons* v. *The London Building Trades Federation* (1895) 72 L.R. 432.

78. Vol. 9. Encyc. of Ct. Forms (Atkin) 614, quoted from Carrothers, *The Labour Injunction of British Columbia* (1956).

79. (1868) L.R. 6 Eq. 555.

80. Supra, n. 79 at p. 560.

81. Supra, n. 79 at p. 561.

82. 1873 (U.K.) 36 and 37 Vict. c. 66.

83. See A.W.J. Thompson "The Injunction in Trade Disputes in Britain before 1910" (1966) 19 Ind. and Lab. Rels. Rev. 213 at 214 where the author suggests that one reason for this was that the unions were too poorly organized to challenge court orders.

84. See infra. s. 17 of Trade Union and Labour Relations Act 1974 (U.K.) c. 52.

85. [1975] 2, W.L.R. 316 and see comment in (1975) 4 I.L.J. 239.

86. If the actions of a union came within this definition the union was exempt from certain forms of tortious and criminal liability. S. 3 Conspiracy and Protection of Property Act 1875, Trades Disputes Act 1906.

87. Davies and Anderman "Injunction Procedure in Labour Disputes I" (1973) 2, I.L.J. at 213.

88. [1965] A.C. 269.

89. Ibid. at 331.

90. Davies and Anderman "Injunction Procedure in Labour Disputes II" (1974) 3, I.L.J. 30.

91. For further discussion of procedure see Davis and Anderman supra n. 89 and n. 93.

92. 1974 (U.K.) c. 52.

93. [1975] 2, W.L.R. 316.

94. [1975] 3, All E.R. 1.

95. Ibid. at 10.

96. Supra n. 94.

97. P. Wallington "Injunctions and the Right to Demonstrate" (1976) C.L.J. 82 at 89.

98. 1975 (U.K.) c. 71.

99. Ibid. Sched. 15, Pt. 3, para. 6.

100. Supra, n. 94.

101. [1978] I.C.R. 582.

102. Ibid. at 587.

103. [1978] I.R.L.R. 507.

104. Ibid. at 511.

105. [1979] I.C.R. 867.

106. 1975 (U.K.), 38 and 39 Vict. c. 86. For background to s. 7 see F. Bennion "Mass Picketing and the 1875 Act" (1985) 61 C.L. Rev. 64.

107. Criminal Law Act 1977 (U.K.) c. 45.

108. Public Order Act 1986 (U.K.) c. 64

109. [1896] 1 Ch. 811, [1899] 1 Ch. 255.

110. (1906) 22 T.L.R. 327.

111. Supra n. 109.

112. [1896] 1 Ch. 811.

113. [1899] 1 Ch. 255.

114. Ibid. at 267.

115. Supra n. 110.

116. Supra n. 110 at 329.

117. See e.g. Hubbard v. Pitt [1975] 3 All E.R. 1 which involved a demonstration by social workers against property development in an area of London. A majority of the Court of Appeal (Stamp and Orr L.J.J., Lord Denning dissenting) held that the actions of the social workers constituted a common law nuisance. For comments on the case see B. Bercusson, "One Hundred Years of Conspiracy and Protection of Property, Time for a Change" (1977) 40, M.L.Rev. 268.

118. 1986 (U.K.) c. 64 sched. 2. para. 1.

119. R.S.C. 1970, c. C-34, s. 381.

120. See infra. ch. 3.

121. There is much authority, judicial and academic that the approach in Ward Lock was the correct one. See e.g. Fowler v. Kibble [1922] 1 Ch. 487, Finkelman "The Law of Picketing in Canada" (1937-38) 2, U. of T.L.J. 67 and 344, Citrine Trade Union Law (3rd ed. 1960) at 449. However in modern times it seems that Lyons v. Wilkins is favoured by the Court of Appeal - see majority decision in Hubbard v. Pitt [1975] 3 All, E.R. 1.

122. 1906 (U.K.) 5 Edw. 7 c. 47.

123. [1922] 1 Ch. 487.

124. See Appendix 1.

125. [1975] 3 All, E.R. 1.

126. B. Bercusson "One Hundred Years of Conspiracy and Protection of Property. Time for a Change" (1977) 40, *M.L.Rev.* 268 at 284.

127. Ibid.

128. [1974] I.C.R. 310.

129. Ibid. at 318.

130. 1977 (U.K.) c. 45.

131. (1868) L.R. 6. Eq. 555.

132. Ibid. at 559.

133. Supra n. 109.

134. [1896] 1 Ch. 811 at 826.

135. (1906) 22 T.L.R. 327.

136. Ibid. at 329.

137. [1978] A.C. 435.

138. See discussion in Elias and Ewing supra n. 54 at 347-351.

139. [1985] I.R.L.R. 136.

140. See D.G.T. Williams "Threats, Abuse, Insults" [1967] *C.L.Rev.* 385 at p. 387-8 where the author gives as examples the Metropolitan Police Act 1839 and the Liverpool Improvement Act 1842. See also *Wise* v. *Dunning* [1902] 1, K.B., 167. Ibid at 388 and *Brownlies Law of Public Order and National Security* M. Supperstone, (2nd ed. 1981) p. 5.

141. See Supperstone ibid at p. 7, Williams supra n. 143 and A. Dickey "Some Problems concerned with the Offence of Conduct likely to Cause a Breach of the Peace" [1971] *Cnm. L. Rev.* 265.

142. One of the leading cases under section 15 is *Jordan* v. *Burgoyne* [1963] 2 W.L.R. 1045 where Lord Parker C.J. defined "insult" as being "hit by words". See also the House of Lords decision in *Brutus* v. *Cozens* [1973] A.C. 854.

143. See Supperstone supra n. 140 at 120.

144. Archbold, Criminal Pleading, Evidence and Practice (42nd ed. 1985) 2119.

145. (1882) 9 Q.B.D. 308.

146. cf. the Irish case of O'Kelly v. Harvey (1883) 10 L.R. lr. 285, 14 L.R. lr. 105 where Beatty v. Gillbanks was distinguished on the basis that a justice of the peace was entitled to use some force to disperse a meeting if he reasonably believed a breach of the peace would occur.

147. [1936] 1 K.B. 218.

148. See T.C. Daintith "Disobeying a Policeman, A Fresh Look at Duncan v. Jones" [1966] Pub. Law 248.

149. 24 and 25 Vict. c. 100.

150. 48 and 49 Vict. c. 75.

151. See note (1936) 56, L.Q. Rev. 158 and note (1937) 6. Camb. L.J. 238.

152. See Daintith supra n. 151 at p. 252-3.

153. Ibid. See now Public Order Act 1986 (U.K.) c. 64.

154. Wershof v. Metropolitan Police Commissioner [1978] 3 All E.R. 540.

155. 1964 (U.K.) c. 48.

156. [1960] 3 All E.R., 660.

157. See Daintith supra n. 151 at p. 260.

158. Supra n. 156 at p. 663.

159. e.g. The writer assisted in the defence of 10 pickets who were arrested and charged with various offences including conducting themselves in a manner likely to cause a breach of the peace, obstruction of the highway and obstruction of the police in the execution of their duty. The pickets had taken part in a large demonstration against Health Services cuts in 1984. All 10 pleaded not guilty and either had no witnesses or were witnesses for each other. They were tried in two magistrates courts in the same building on the same day. The police who gave evidence were all allowed to refer to their notebooks to "refresh" their memories. All 10 were convicted of all charges and fined. In every case the evidence of the police officer was accepted above that of the picket. In the majority of the cases there were inconsistencies in the police

evidence which was accepted despite the fact that much of the pickets' evidence was corroborated by other pickets.

160. cf. cases of arrests for obstruction in the course of a policemans' duty based on other offences e.g. in Rice v. Connolly [1962] 2 Q.B. 414 it was held that a refusal to answer police questions was not a wilful obstruction as there was no duty to answer the questions.

161. [1960] 3 All E.R. 660.

162. 1971 (U.K.) c. 72.

163. Ibid. sched. 9.

164. [1974] 2 All E.R. 177.

165. Ibid. at 183.

166. R v. Madden [1975] 3 All E.R. 155.

167. e.g. Homer v. Cadman (1886) 73 L.J.K.B. 341.

168. [1965] 3 All E.R. 99.

169. (1974) A.C. 587.

170. Ibid. at 601.

171. See e.g. Kidner "Picketing and the Criminal Law" [1975] Crim L. Rev. 256 at p. 263. The Society of Labour Lawyers and the Trades Union Congress put this proposal forward to the Donovan Commission on Trade Unions and Employers' Associations. It was rejected.

172. Cmnd. 3623 para. 874.

CHAPTER 3 - THE LAW RELATING TO PICKETING IN BRITAIN 1980-87

I INTRODUCTION

The previous chapter has shown how picketing was not usually the direct target of injunctions requested by employers to curtail industrial action. The majority of the reported civil cases concern injunctions to prevent other forms of industrial action, particularly the strike.[1] When picketing did occur it was often dealt with by way of the criminal law.[2] Offences which had evolved from the law relating to public order were used to charge offenders on the picket line, regardless of their rights under civil law.

The granting of interlocutory injunctions in civil cases had been regulated to some extent by section 17 of the Trade Union and Labour Relations Act 1974.[3] Section 17(2) had been passed in an effort to get around the application of the House of Lords decision in *American Cynamid* v. *Ethicon*.[4] In that case the House had held that the plaintiff had only to establish that there was a serious question to be tried in order to succeed in an application for an injunction. Section 17(2) required a court also to consider the fact that a defendant may be able to raise the statutory defence at trial, that his action was in furtherance or contemplation of a trade dispute. However the section had a very limited effect in practice. As was demonstrated in *Hubbard* v. *Pitt*[5] section 17(2) clearly did not apply in a non trade dispute situation. Even where there was a trade dispute the judges were only directed "to have regard" to the statutory defence. The conclusion that the judges reached could still be based on the principles in American Cynamid. The result for the defendant union would very often be that the injunction effectively ended the dispute. Trial of the action was rarely necessary. The strength of the defendants' case was thus never fully explored.

Trade unions could not be sued in tort in 1979.[8] Tortious actions had to be brought against union officers and members only. The difficulty in identifying individual members on a picket line is possibly a partial explanation of why few civil actions were brought against pickets. Even if a picket was identified and sued there were usually many others to take his place on the picket line. The effectiveness of an injunction against individual pickets was therefore limited. Potential civil liability for pickets was actually very wide even under the terms of TULRA. Persons who were found to be acting in contemplation or furtherance of a trade dispute were immune from certain forms of tortious liability. The immunity covered inducing breach of contract, threatening breach of contract, inducing interference with the performance of a contract, threatening interference with the performance of a contract, interfering with the trade, business or employment of another or with the right of another to dispose of his capital or labour. Torts that were not covered and were often present in picket line situations included trespass, assault, defamation and nuisance. However as stated above individual pickets were more often dealt with by the criminal law.

Even in civil cases where it would appear that the golden formula might apply the courts, and in particular the Court of Appeal, greatly reduced the effect of the statutory defence after 1974. Thus Lord Denning held that a threat by a union to take industrial action unless a sporting event was not transmitted to South Africa was not a trade dispute but a political dispute.[7] In Associated Newspapers Group Ltd. v. Wade[8] Lord Denning held that secondary action was unlawful at common law and too remote to be in furtherance of a recognition dispute. Finally, in three cases, Express Newspapers Ltd. v. MacShane,[9] N.W.L. v. Woods[10] and Duport Steels Ltd. v. Sirs,[11] the Master of the Rolls held that "furtherance" itself had to be defined in an objective manner. Conduct was therefore only protected if it was reasonable that it might achieve the aims of a dispute. It did not matter that union officials genuinely believed that such conduct would achieve such aims.

Lord Denning further complicated the issue in the MacShane case by stating that,[12] "To be 'in furtherance of' a dispute, an act must give practical support to one side or the other and not merely moral support." To attempt to distinguish trade union actions during a dispute between those giving practical support and those giving moral support would be virtually impossible. Even more importantly, a trade union would find it extremely difficult to predict when their actions were within the law and when they were not. In choosing to impose an objective test, Lord Denning was sacrificing certainty of the law for those to whom the law applied. The censure against mere moral support was clearly intended to discourage sympathy action by workers. This was despite the fact that section 29(3) of T.U.L.R.A. provided that, "There is a trade dispute for the purposes of this Act even though it relates to matters occurring outside Great Britain." The legislature had thus clearly allowed sympathy action in support of workers abroad and it would be quite surprising if lesser rights were accorded to sympathy action in support of workers inside Great Britain.

The judgment of Lord Denning in the MacShane case was followed by that of Mr. Justice Ackner in United Biscuits (U.K.) Ltd. v. Fall.[13] The facts of the Fall case involved secondary picketing by members of the Transport and General Workers Union who were in dispute with the Road Haulage Association. Truck drivers picketed the premises of a supplier to the plaintiff company. The plaintiff company was not involved in any dispute with its own employees, but those employees who arrived at the suppliers to take delivery of goods were turned back by the pickets.

Ackner J. granted an interlocutory injunction to restrain the picketing and in so doing applied Lord Dennings' tests of moral and practical support. Refusing the plaintiffs access to their supplies did not give practical support to the main dispute, only moral support. Further Ackner J. found that the acts of the defendant pickets were too remote to be in furtherance of the main dispute and thus did not qualify for protection under section 13 of T.U.L.R.A. Authority for the latter proposition was found in an earlier Court of Appeal judgment, Beaverbrook Newspapers Ltd. v. Keys.[14]

Judicially however, the Court of Appeal was not to have the last word. Three cases it considered were appealed to the House of Lords. Their Lordships had to consider in Express Newspapers Ltd. v. MacShane,[15] NWL v. Woods[16] and Duport Steels Ltd. v. Sirs,[17] what Parliament had intended when it enacted s.13 of T.U.L.R.A., the section which gave immunity from actions in tort for acts done "in contemplation or furtherance of a trade dispute" leading to inducement of breach of contract.

In what might at first glance appear to be liberal decisions,[18] it was held in all three cases that the correct test to apply was the subjective one. If the union felt that its actions were furthering the trade dispute, then it was not for the court to make an objective decision as to whether they really were or not. However, although their Lordships did not feel that they could agree with Lord Denning as to the interpretation of sections 13 and 29 of TULRA, the majority of the House certainly agreed with the philosophy behind his reasoning. They made this clear in their judgments, even while reversing the Court of Appeal decisions. Lord Diplock makes no secret of his view in all three cases.[19]

> My lords, if a demand on an employer by the union is about terms and conditions of employment, the fact that it appears to the court to be unreasonable because compliance with it is so difficult as to be commercially impracticable or will bankrupt the employer or drive him out of business does not prevent its being a dispute connected with terms and conditions of employment. Immunity under s.13 is not forfeited by being stubborn or pigheaded.

Lord Scarman openly makes suggestions as to how Parliament should amend the statute.[20]

> ...the draftsman should be bold and tackle his problems head on. If he is to put a limitation on the immunities in s.13, let him do so by limiting the heads of tortious liability where immunity is conferred; if he is to strengthen the availability of interlocutory relief in industrial relations, let him include clear guidelines in the statute.

The Conservative Party which came into power in 1980 was to take up Lord Scarman's invitation. This chapter examines how the new government by a series of civil statutes dramatically altered the law as it related to the conduct of trade unions in labour disputes. The development of the criminal law will then be examined. First, it is interesting to look briefly at the ideology of the new government in relation to trade unions as a background to the statutory changes.

II Liability of Pickets under the Civil Law

(1) Philosophy of Conservative Party towards Labour Relations in the 1980s - The "new conservatism"[21]

The views expressed in the Court of Appeal and the House of Lords in the years immediately preceding 1980 indicated the concern at the extent to which T.U.L.R.A. appeared to protect industrial action taken by unions. Action taken against an employer who was not a party to the dispute was viewed as particularly abhorrent. To a great extent these views were mirrored in the philosophy of the Conservative Party which came into office in 1980. The new government wasted no time in enacting a series of statutes which operated as amendments to TULRA. The government did not introduce a whole new statutory scheme as had been done in 1971,[22] but built on the existing framework of immunities. Picketing was to receive particular attention. A code was enacted by way of statutory instrument which was intended to act as a guide to conduct on the picket line.[23] New statutory provisions restricted the scope of secondary picketing. Another new statute redefined the various public order offences.[24] The sum of these changes has undoubtedly restricted the right of every individual to picket peacefully.

The changes referred to above were the result of new policies of the Conservative Party. The prolonged strikes of the 1970s had given cause for concern on two fronts - firstly, the much more obvious effects of mass picketing per se, and secondly the increased practice of secondary picketing. Picketing scenes became commonplace on news broadcasts and this visible evidence assisted the new government in persuading the public that the unions were at the root of many current wrongs such as inflation and unemployment. The government supported its beliefs by the twin theories of monetarism and neo-liberalism. Briefly, monetarist theory rests on self-regulation of the marketplace as a method of controlling recession, inflation and unemployment. This self-regulation is interfered with by trade unions who try to raise wage levels and in some instances control the supply of labour. Neo-liberalism is the reduction to the minimum of the state's function of government. Trade unions interfere with this idea by bringing pressure to bear on the government, necessitating further government action and intervention.[25]

One proponent of monetarism and neo-liberalism is Professor F.A. Hayek who writes that British trade unions have "special privileges" which enable them to wield power.[26] This statement has in turn sparked off a debate as to whether this is a correct description of the "immunities" from liability given to the unions. The contrary view is that the immunities are merely the peculiar British form of rights which have been granted to unions in other jurisdictions such as the right to strike, and the way the immunities are expressed are an accident of, or can be explained, by history.[27]

In reality, what the unions had in fact was something less than an immunity or a right. It was true that T.U.L.R.A. gave the unions certain immunity from prosecutions in tort and that this could be conversely viewed as a right to take certain action free of interference. However, to qualify for the immunity, the union had to fulfill other criteria, most important of which was that the conduct had to be in contemplation or furtherance of a trade dispute. The Court of Appeal decisions of the 1970s which are described above, illustrate that the unions were not free to take whatever action they pleased, as might be thought from a description such as privileges, immunities or rights.[28] It is surprising that in their green paper on 'Trade Union Immunities' in 1981,[29] the government advocated that a positive system of rights be introduced. Surprising because the Employment Act 1980[30] was already on the statute books which made changes based on the existing statutory framework of TULRA.

(2) Statutory Changes Relating to the Conduct of Industrial Action

(a) The Employment Act 1980[31]

The sections of the 1980 Act of relevance to this paper are sections 16 and 17. These are produced in full in Appendix 1. Section 16 replaced section 15 of TULRA which had dealt with the permissable extent of picketing. The new section expresses the right to picket in positive terms, "It shall be lawful for a person...". The extent to which this phraseology gave employees an absolute right to picket was limited even before any cases came before the courts by the subsequent terms of the section. Picketing is only lawful if done in contemplation or furtherance of a trade dispute and at the employees own place of work. Trade union officials may accompany their members when they are picketing. For an employee who works in various places it is provided that the place for him to picket is any premises of his employer from which he works or from where his work is administered. An employee who is dismissed as a result of a trade dispute can picket at his former place of work. Only conduct within the new section would have the protection of section 13 of TULRA,[32] that is, immunity from various actions in tort.

Section 16 (which was henceforth to be section 15 of TULRA) thus considerably limited the locations where workers could picket and the permissible number of pickets. It could be argued that section 16 was merely stating what was lawful. Did that therefore imply that sympathy picketing by trade unionists at locations other than their own place of work was unlawful? What about friends of pickets or members of the pickets' family who did not work at that location and were not union members, but who came to give support? These would be questions for the courts to answer. In the meantime other forms of secondary action were further restricted by the terms of section 17 of the 1980 Act.

Section 17 is extremely complicated in its terms and is directed more towards the practice of blacking or boycotting rather than picketing. Essentially the section provides that indirect action (e.g. by inducing employees to breach their contracts) against a secondary employer who is not a party to the dispute does not have the protection of section 13(1)[33] of TULRA, unless it falls within one of the so-called gateways to legality.[34] The gateways are to be found in sections 17(3), (4) and (5). For present purposes it is sufficient to note that section 17 is directed towards the prevention or disruption of the supply of services or goods between employers during a dispute.

It is therefore now open to employers to organise their business into various groups of companies to reduce the circumstances when unions can take industrial action. Action against a primary employer might then turn out to be action against a secondary employer, even though the holding company is the same. The courts will not pierce the corporate veil to see if the same employer is controlling all the subsidiary companies.[35] Production cannot be switched from one subsidiary company to another during a dispute because section 17(4) protects secondary action to prevent or disrupt the supply of goods or services if they are, "in substitution for goods or services which but for the dispute would have fallen to be supplied to or by the employer, who is a party to the dispute." The business would have to be handled by separate companies before the dispute arose.

Section 17(5) preserves the rights of employees to picket at their own place of work within section 15 of T.U.L.R.A. even if the employees are also engaging in secondary picketing. Such a situation might arise where the employees are disrupting supplies to a customer of the primary employer. Provided that the primary picketing is in accordance with the terms of section 15 any resulting secondary action will be protected.

(b) Code of Practice on Picketing[36]

The statutory provisions are bolstered by the Code of Practice on Picketing introduced in 1980 by way of statutory instrument. The Code is set out in full in Appendix 1. The Code is expressed to be of practical guidance and of evidential value only.[37] As the cases will illustrate however the Code has been elevated to the level of a statute in the way that it is used to regulate picketing.[38] The Code is in six sections which deal with the civil law, the criminal law, the role of the police, the number of pickets, the organization of picketing and picketing which disrupts essential services and supplies. It is from the Code that the magic number of six has appeared as being the appropriate number of pickets at an entrance to a workplace.[39] The Code emphasizes that the civil law does not protect pickets who commit criminal offences,[40] but the impartiality of the police in a trade dispute is emphasized.[41]

(c) The Employment Act 1982[42]

In what appears to be a contrast to their neo-liberal beliefs, the government continued to enact by statute their new legal framework for trade unions. The 1982 Act is also expressed by way of amendment to TULRA. Like the 1980 Act, the Employment Act 1982 destroyed from within the existing statutory framework the various immunities, privileges or rights remaining to unions.

Section 15 of the 1982 Act[43] ended the immunity of trade unions from actions in tort. A union can now be sued in the same way as an individual. In cases where an employer wishes to rid himself of a troublesome picket line he can now sue the union itself and obtain an injunction against the union. The employer does not have to identify individual defendants any longer. In cases where an injunction is not obeyed, the court can now fine the union directly rather than fining union officials or imprisoning individual defendants for contempt. Section 15 provides that whether or not industrial action is in fact authorized by the union depends on the authorization or repudiation of the action by a list of bodies or officers of the union.[44]

Section 16[45] provides a scale for damages awarded against unions in tort. The scale depends on the membership numbers of the union, not its resources. The maximum is £250,000 if the union has over 100,000 members. The limits apply to only one action and not to total damages which might be awarded from several suits arising from the same facts. Certain actions, such as liability for personal injury are subjected to unlimited damages.

A common law rule exists to the effect that if damages are an adequate remedy an injunction will not be issued.[46] This rule was rarely applied in labour dispute cases because employers would argue that damages recoverable from a union official would not be sufficient. Now that damages can be recovered from a union the argument has even more weight because section 16 limits the amount of damages that can be recovered. The likelihood that an injunction will be imposed as well as damages has increased.[47]

If a union does not obey an injunction order it will be held to be in contempt of court. Civil contempt proceedings can then be invoked by the plaintiff. The remedy for civil contempt is usually a fine or imprisonment. Imprisonment is rarely used in modern times because of the rallying effect it has on other union members. In the 1970s and 1980s fines have more often been levied against unions for civil contempt. There is no limit on the amount that a court can fine a union for contempt. The amount of fines awarded has very often been a significant factor in the settlement of some labour disputes. For example during the Messanger dispute in 1983 the National Graphical Association was fined a total of £525,000 for contempt.

Another remedy which has been used in recent times is that of sequestration.[48] Until 1966 it was unclear whether the remedy could be used to enforce a negative injunction.[49] The Revised Rules of the Supreme Court made it clear that this was possible and the remedy is now often invoked against unions who are in breach of an injunction. The practical implications of the remedy are that the property of the union is siezed up to a given value ordered by the judge. Accountants are appointed to trace union funds. Banks and others holding money for unions are obliged to disclose details of funds. The costs of the sequestration can escalate very quickly and the union is responsible for these. Further the siezure of assets such as buildings and office furniture makes it very difficult for the union to function. If the union purges its contempt by apologising to the court the assets are returned. Some of the cases which will be discussed in this chapter illustrate how the multiplying effect of fines and sequestration can pressure a union to end a dispute.[50]

Section 18[51] of the 1982 Act amends section 29 of TULRA which had defined the term "trade dispute". Instead of being merely connected with one or more of the given list of features of a trade dispute, the dispute must now relate "wholly or mainly" to one or more of the features. The result is to limit severely the ambit of the defence that action was taken in contemplation or furtherance of a trade dispute. Disputes between workers and workers are now omitted from the definition of trade dispute. The dispute must be between employees and their own employer.[52]

Finally, section 19(1)[53] repealed section 13(2) of TULRA.[54] Section 13(2) had declared that an act done in contemplation or furtherance of a trade dispute was not actionable in tort on the ground that it interfered with the trade, business or employment of another person or with the right of another to dispose of his capital or labour as he wills.

(d) Trade Union Act 1984[55]

For the sake of completeness brief details of this Act are necessary. Basically the Act provides for secret ballots among trade union members for trade union elections and before industrial action. A ballot before industrial action is not compulsory, but if a ballot is not held the union loses such immunities as are left for liability arising from industrial action.

It might have been thought that the effect of more statute law in the field of industrial disputes would serve to clarify the law. Certain things were clear. A picket now knew that his civil right to picket did not protect him from the criminal law. A union now knew exactly how much compensation it might be expected to pay if it lost an action in tort. Other matters were less than clear to at least half the group that the statutes applied to - the unions. Now that various immunities from tortious actions had been removed it was not clear what degree of industrial action was still permissible. How could a union know when the employer had organized his business into different companies so that the union could be picketing a primary and secondary employer at the same time? What new torts would the courts develop to apply to industrial action now that it was clear that the legislative trend was away from immunity?

A recent survey[56] has shown that between 1980 and 1984 the overall extent of industrial action increased in Britain. The percentage of workplaces affected rose from 22% to 25%. Over the same period it was found that the extent of picketing had declined but that organization (numbers involved in an 'average' picket) and impact (effect on the movement of goods and people) had remained constant. Increase in litigation as a result of the new legislation was not measured in any way, but it is fair to assume that the availability of a union as a defendant has increased the potential for unions to become involved in expensive lawsuits as a result of industrial action. The next section looks at how the cases have developed the common law still further in relation to picketing and interpreted the new statutes.

(3) Common Law Torts Committed on the Picket Line in the 1980s

There has been an increase in the number of reported cases since 1980 where injunctions have been sought to restrain picketing. However the previous statement should be qualified by pointing out that the majority of the reported cases have arisen out of circumstances where picketing has taken place on a large scale. The miners' strike for example lasted for one year (1984-5) and involved extensive picketing all over the country. Mass picketing at the new Wapping site of News International Ltd. lasted for one year (1986-7). Other disputes were of a shorter duration but also involved large picketing demonstrations.[57] It is perhaps surprising that more injunctions were not sought to restrain picketing. However employers have not overwhelmingly rushed to use the civil law provisions of the Employment Acts of 1980 and 1982. Even during the miners strike the reported cases arose out of actions by working miners and not the employer. During the Wapping dispute the employer after eleven months ultimately used the leverage of a civil injunction and a threatened action for contempt to settle the dispute. What is regrettable is that the jurisprudence that has resulted from cases of mass picketing is of course just as applicable to the vast majority of picket lines which are small, well-behaved and often operated with the cooperation of the police.[58]

(a) Mersey Dock and Harbour Company v. Verrinder[59]

The common law continued to develop with regard to picketing. In Mersey Dock and Harbour Co. v. Verrinder the cases of Lyons v. Wilkins[60] and Ward Lock and Co. Ltd. v. Operative Printers' Assistants' Society[61] were once again discussed. The case arose out of a dispute at the docks in Liverpool. Picket lines were mounted by members of the Transport and General Workers' Union in protest against the use of non-union haulage contractors. The Port Authority brought an action against the pickets and sought an order for an injunction by way of affidavit. The judgment of Fitzhugh J. [illegible]ons the fact that the pickets were not at their own place of work as proscribed by the new section 15 of TULRA. However his decision is not based on that point, maybe because the affidavit evidence was not conclusive on the point. Instead the plaintiffs raised the question of nuisance and Fitzhugh J. proceeded to discuss *Lyons* v. *Wilkins* and *Ward Lock*. The defendants argued that the picketing had been entirely peaceful and therefore the principles of *Ward Lock* should apply. That is, in the absence of obstruction, violence, intimidation, molestation or threats there was no nuisance.[62]

Fitzhugh J. disagreed. he held that the state of mind of the pickets was crucial to detect a nuisance. He found that the intention of the pickets was,[63]

> ...tantamount, in my view, to an attempt on the part of the defendants to regulate and control the container traffic to and from the company's terminals. If that is right, the conduct of the pickets is, in my view, capable of constituting a private nuisance.

Fitzhugh J. pays lip service to the provisions of section 17(2) of TULRA regarding the granting of the injunction. He then makes the order on the basis of the balance of convenience which is found to favour the plaintiff. Fitzhugh J. cites the decision of Orr L.J. in *Hubbard* v. *Pitt*[64] as authority for the proposition that the state of mind of the pickets was crucial. However in the former case Orr L.J. had been alluding to the full trial of the issue when the presiding judge would see the witnesses, hear their evidence and form his opinion as to their credibility. Thus Orr L.J. had said when discussing nuisance,[65]

> A crucial question in the present case is on which side of this dividing line the facts lie, and this issue it must be assumed, will in due course, either alone or in conjunction with other issues, come on for trial on evidence including that to which Stamp L.J. has

> referred, and probably also oral evidence, which will be of great importance, as to the defendants' intention and state of mind. In these circumstances, I think it undesirable to say anything more at this stage as to that issue or any other issue which may arise at the trial, and I return to the Cynamid case.

Quite properly Orr L.J. left the findings of fact to the trial judge. Fitzhugh J. in the Mersey Dock case also did not have the benefit of hearing witness evidence because all evidence was by affidavit. It is therefore submitted firstly, that Fitzhugh J. was erroneous in forming an opinion as to the intention of the pickets without having heard their evidence directly. Secondly, Fitzhugh J. lifted the words of Orr L.J. from the judgment in Hubbard v. Pitt and applied the content in circumstances different to that postulated by Orr L.J.

(b) Thomas v. N.U.M.[66]

Thomas v. NUM[67] was a case which arose out of the 1984-5 miners' strike.[68] The strike involved extensive picketing all over the country. The employer of the miners, the National Coal Board obtained injunction orders at the beginning of the dispute and then took the matter no further.[69] Thomas v. NUM was an action brought by miners who wished to work and who objected to passing mass pickets every day.[70] The case was heard before Scott J. at first instance. Various submissions were made by the plaintiffs as to the tortious liability of the defendants.

A submission that the picketing was interfering with the plaintiffs' contracts of employment failed because the plaintiffs were still working. They had therefore suffered no injury in that respect. Assault was not accepted as a basis of liability because the workers were entering the collieries in vehicles with police escorts. Scott J. held that even if the pickets had the intention to assault, they did not have the capacity.

It was further submitted by the plaintiffs that the defendants were liable in tort for a breach of section 7(1) and (4) of the Conspiracy and Protection of Property Act 1875. This submission was also rejected by Scott J. on the basis of the decision in Ward Lock & Co. Ltd. v. The Operative Printers' Assistants' Society.[71] Scott J. agreed with the proposition that an independent tort was necessary to incur liability under section 7.

The picketing conduct was judged to be outside of the terms of the new section 15 of TULRA because the conduct went beyond peaceful persuasion. The picketing was therefore not protected by statute. Having disposed of all relevant modes of tortious liability Scott J. arrived at the novel theory that the pickets were unreasonably interfering with the right of any citizen to use the highway and this was actionable in tort.[72] The new tort of harassment would appear to be based on nuisance but does not fit clearly into the category of private or public nuisance. For private nuisance a plaintiff must establish an unlawful interference with his land. In Thomas the workers were not the owners of the workplace. They had only a license to enter to work. To sustain an action in public nuisance a plaintiff must prove particular damage beyond that suffered by the community. However the plaintiffs were not suffering any special damage as they were still able to get to work. Moreover Scott J. himself did not distinguish between the working miners and "all citizens" who had the right to use the highway free of interference. It is thus not easy to trace the basis for the new tort.[73]

Of more immediate concern was the connection that Scott J. made between harassment and paragraph 31 of the Code of Practice on Picketing. Paragraph 31 recommends that six is an appropriate number of pickets at a workplace entrance and six is the figure that Scott J. expressly includes in the terms of the injunction order.[74] There is therefore the potential that in the future any picket line of over six people will be deemed to be an unreasonable interference with the right of other citizens to use the highway. Potential plaintiffs could in fact be anyone. Those that spring to mind are strikebreakers and residents of local communities. Thus even the most peaceful picket line could be enjoined on the basis of the new tort.

The style of reasoning adopted by Scott J. made no attempt to balance the rights of the pickets against the rights of other people to use the highway. The result of the judgment is that the pickets are judged by the effect of their actions on those who wished to work. The tort of unreasonable interference with the highway is far easier to apply than inducing breach of contract and was applied in this case because the action was brought by working miners and not an employer or secondary party. However, together with the finding that mass picketing is by definition intimidating, the judgment seems to exalt the provision in the Code on Picketing that the number should not exceed six to the status of primary legislation. The Code itself expressly states that it does not have the status of primary legislation.[75]

To date the new tort has not been applied in a subsequent case. In News Group Newspapers v. SOGAT,[76] also a first instance case, the defendants criticised the tort enunciated in Thomas v. NUM.[77] Stuart-Smith J. in reply remarked as follows: "I am bound to say that, with all respect to Scott J. I think there is force in these criticisms, especially where it does not appear that damage is a necessary ingredient of the tort." However in the News Group Newspapers[78] case liability was founded on intimidation and nuisance so that Stuart-Smith J. did not express a final view on the tort. For the time being then the tort continues to exist pending a later case reaching the Court of Appeal or House of Lords. It would be interesting to see what the appeal court judges would make of the tort which has, in the opinion of the writer, an unsound basis in law.

The decisions in Thomas v. NUM and the Mersey Dock case severely restrict the right to picket in any circumstance, not just that of a trade dispute. Unfortunately injunction orders made in the course of a trade dispute are not often appealed. If the plaintiff employer has his injunction he has no interest in appealing. As far as the defendant union is concerned the injunction order is still effective pending appeal so that the dispute may in fact be over. There is also the fact of the added cost of going through the appeals procedure which may appear to some trade unions to be an unwelcome extra cost when the dispute is already over.

The employer may even use the granting of the injunction as a bargaining counter in effecting a settlement with the union.[79]

The substantive law made in the first instance courts therefore applies to all picket lines violent or not and at least insofar as they consist of over six people. Whilst becoming more restrictive of picketing, the law is also being applied in a haphazard fashion so that pickets cannot predict what conduct is permissable on the picket line.

(4) Application of the Employment Acts 1980 and 1982 to Picketing

In Richard Read (Transport) Ltd. v. N.U.M.[80] section 15 of the 1982 Employment Act was used to determine whether or not union officials had authorized picketing activity in contravention of the terms of a previous interlocutory injunction. This action also arose out of the miners strike and was brought by haulage contractors who were crossing the picket lines. Park J. held that before the union could be held to be in contempt there had to be prima facie evidence that their conduct was authorized or endorsed by a responsible person within the meaning of s.15(3) or (4). The union did not defend the contempt proceedings and Park J. therefore accepted the invitation of the plaintiff to infer from newspaper reports that the union head office had authorized the picketing activity.

There was no direct affidavit evidence from the plaintiff on this point. There were only various newspaper reports which were submitted to the judge, together with copies of letters to the plaintiff solicitors from the defendant solicitors stating that the union and its members would comply with the terms of the injunction. It is not made clear by Park J. upon what basis the newspaper report and the letters were accepted as evidence. It is possible that to get around the rules relating to the non-admissability of hearsay evidence the contents were accepted as an implied admission in the absence of the defendants.

It is suggested that the basis of accepting the evidence should have been made clear. The miners' strike was heavily reported by the media and, as with most political issues, the media will take sides. A newspaper report could doubtless be found to support any and every proposition about the dispute. In this case just one report was presented which claimed to quote a union official offering to cut the numbers of pickets. It was inferred from this that he was controlling the pickets. A finding that the union had authorized the conduct was crucial to the ability of the court to fine the union the considerable sum of £50,000.

In *News Group Newspapers* v. *SOGAT*[81] the location of picketing was discussed in relation to the new section 15 of TULRA. The dispute involved the sacking of over 5,000 print workers by the plaintiff employer when the business moved from Fleet Street to the London docks area of Wapping. The action brought by the employer was to restrain mass picketing at the new Wapping plant. Stuart-Smith J. held that as none of the sacked workers had worked at the new plant they were not picketing their place of work or their former place of work as required by the statute. This is a very literal interpretation of the section. The business being conducted at the plant was essentially the same and had the workers not been dismissed they would have been working there. The mass picketing was also found to be tortious by reason of it being a public and a private nuisance, intimidation, and interference with contract. The injunction order limited the number of pickets at the workplace entrance to six which contradicts the finding that pickets who had not worked at those premises could not lawfully picket there within the terms of section 15. The order did not specify who the six were to be so that those who had not worked at the new plant would doubtless have made up the number. It seems that even the judges have practical problems in applying the terms of the new statutes.

(5) The Labour Injunction after American Cynamid v. Ethicon[82]

As shown in Chapter 2 Lord Denning had advocated in Hubbard v. Pitt[83] that in cases where the interlocutory injunction in effect disposed of the action, there should be a consideration of the merits of each party's case. When section 17 of TULRA was amended to ensure that a defendants statutory defence was considered Lord Denning appeared to change his mind and favour the balance of convenience test instead. In Star Sea Transport Corporation of Monrovia v. Slater[84] Lord Denning said

> It seems to me that the balance of convenience is in favour of issuing an injunction to stop the blacking. On the one hand this vessel has been held up for days. She is prevented from sailing and her lawful activities of carrying grain across the world...
>
> On the other hand, if the injunction issues, what damage will be done to these men of the federation? They do not suffer any actual damage. They only lose a bargaining counter which is in their hands.

A consideration of the balance of convenience was not prohibited by the statute, but the degree of likelihood of the success of a statutory defence should at least be considered as required by the statute.

(a) NWL v. Woods[85]

In 1979 the question of interlocutory injunctions in labour disputes came before the House of Lords. In NWL v. Woods[86] Lord Diplock held that as a result of section 17(2) of TULRA[87] the court had to have regard to the likelihood of the defendant raising a successful statutory defence at trial. Lord Diplock had regard to what he called the "practical realities" of granting an interlocutory injunction in a labour dispute case. One of these was a recognition that a grant or refusal of the injunction would normally dispose of the matter. If the injunction was granted the dispute would very often be over for the union. If the injunction was refused the plaintiff (at least before 1982) would in most cases not proceed with the action to trial as the defendant was only a named union official from whom substantial damages would not be forthcoming.

However Lord Diplock also said that of relevance was[87a] "...the degree of irrecoverable damage likely to be sustained by the employer, his customers and the general public if the injunction is refused and the defence ultimately fails." So while recognizing the special position of trade disputes, Lord Diplock does not entirely rule out the possibility that judges can use the balance of convenience test if they feel the circumstances warrant it. The use of other tests is not contrary to the statute as section 17(2) only states that regard must be had to the likelihood of a statutory defence arising. However the continued use of the balance of convenience test despite section 17(2) ensures that in the majority of cases the plaintiff employer will obtain his injunction. In Duport Steels Ltd. v. Sirs[88] Lord Diplock further held[89] that the discretion in section 17(2) of T.U.L.R.A. of granting or refusing an injunction was vested in the trial judge only. It was not for an appeal court to substitute their own discretion. An appeal court could only adjudicate on an error of law.

(b) Dimbleby and Sons Ltd. v. National Union of Journalists[90]

As a result of the statutory changes in 1981 and 1982 the availability of a statutory defence based on the golden formula became more remote. In a study on civil law remedies sought by employers since the 1980 Employment Act came into force,[91] a commentator noted that the majority of injunctions sought against picketing were on the grounds that the picketing was not at the employees' own workplace. Moreover the person who most often sought the injunction was the primary employer. By granting the order the court was thus entering into the collective bargaining arena and giving an advantage to the employer in terms of the actual dispute. However, if the employees were clearly not at their own workplace, the courts were bound to find that the picketing was unlawful under the new section 15 of TULRA.[92] So although the injunction gave the employer a bargaining advantage, it was the legislation and not any interpretation by the court which was at the basis of the order. This is a different situation for British industrial relations law where traditionally if a statutory defence did not apply, the picketing would have been dealt with by way of the economic torts as devised by the judges. The new legislation was thus far more interventionist in character.

The House of Lords considered the rules that applied in granting interlocutory injunctions in labour disputes further in 1984. Lord Diplock gave judgment for the House in Dimbleby and Sons Ltd. v. National Union of Journalists.[93]. Lord Diplock considered that as a result of the statutory changes since 1980 the "practical realities" of which he had spoken in NWL v. Woods no longer applied. Lord Diplock said that,[94]

> As a result of the passing of the Acts of 1980 and 1982, however, what in 1979 were practical realities, no longer apply in 1983 to a suit against a trade union claiming damages for an injunction to restrain it from secondary action which is actionable. If the suit succeeds, the trade union will be liable not only in damages up to a substantial maximum..., but also for costs without any maximum limit, and to unlimited fines or sequestration of its assets if, by breaching an injunction, it should commit contempt of court.

The increased vulnerability of the union as a result of losing its immunity for tortious actions did not in the view of Lord Diplock entitle it to increased protection from an interlocutory injunction. He meant that a judge should no longer consider that the case would never go to trial. Lord Diplock then confused the issue somewhat by proclaiming that applications for an injunction to prevent secondary action within section

17 of the 1980 Employment Act were still subject to the statutory requirement that a judge should consider whether the defendant could successfully maintain a defence that he was acting in contemplation or furtherance of a trade dispute. All other issues of the defence were to be dealt with by,[95] "...the ordinary criterion laid down in American Cynamid v. Ethicon Ltd. [1975] A.C. 396 'Is there a serious question to be tried?'"

The exact relationship of the two tests and how a future judge is to deal with them is not explained by Lord Diplock. It seems that the Dimbleby case heralds a return to the balance of convenience test as a prominent feature. As explained earlier, the balance of convenience test is more often than not more solicitous of the employer's loss of business. The Dimbleby case also reinforced a return to the principles of American Cynamid. This can be illustrated by the subsequent first instance decision of Stuart Smith J. in News Group Newspapers v. SOGAT.[96] The judge found in this case that the picketing conduct of the union was outside the statutory protection. He then proceeded to apply without question American Cynamid in finding that the plaintiff had established a serious issue to be tried and that the balance of convenience lay with the plaintiffs.

The renewed application of the principles of American Cynamid to labour dispute cases plus the decreased protection of the trade dispute defence leaves unions and their funds extremely vulnerable when pursuing industrial action. Earlier in this chapter it was described how unions in breach of injunctive orders now find that they are fined large sums for contempt of court. In addition a union may face the penalty of sequestration of assets which is expensive and also poses practical problems in that the union may find it difficult to continue to function. There can be no lasting acts of defiance by the defendant union, because as court procedures go on endlessly the ultimate sanction would be the bankruptcy of the union. Lord Wedderburn has written that,[97] "The procedural aspects of the law relating to strikes, which have been too often ignored in discussions about labour law, now occupy the centre of the stage". As successive unions are defeated in the courts by financial penalties it is likely that the procedural aspects will become even more important in all areas of labour law, not just that relating to strikes.[98]

III The Criminal Liability of Pickets in the 1980s

(1) The Miners Strike 1984-5

The extended nature of the miners' strike and the many prosecutions arising out of the strike have assisted the compilation of data about the criminal offences charged and the conduct of the police.[99] It has been calculated that 1,1291 people were arrested in connection with the dispute in England, Scotland and Wales.[100] Not all of those arrested were prosecuted and the majority of those charged, were charged with breach of the peace or obstructing the police in the execution of their duty. In England there were in addition 509 charges of unlawful assembly, 139 of riot, 21 of affray and 643 charges under section 7 of the Conspiracy and Protection of Property Act 1875.[101]

The minor charges would have been dealt with in the magistrates courts. Apart from cases where appeals were made on points of law[102] it would be difficult to accumulate information concerning the summary proceedings. Rather more can be learned from the trials of the more serious offences of riot and unlawful assembly. Many of those arrested on these charges were arrested at large demonstrations at the Orgreave coking plant in 1984. The trials began in the summer of 1985 and disturbing evidence emerged concerning police conduct. There was disclosure of secret plans by the police to use allegedly illegal para-military tactics against pickets and demonstrations.[103] A confidential police manual called 'Public Order, Tactical Options' compiled by the Association of Chief Police Officers was revealed. The manual gave instructions to police officers to use their truncheons and horses to disperse crowds.[104] Perhaps even more disturbing were the admissions by police constables that they had written down what they were told to by a senior officer in their notebooks as evidence.[105]

The result of such disclosures was the acquittal of the majority of those charged and tried initially. Subsequently the prosecution offered no evidence on charges against other defendants pleading that the trials would take too long, the memories of witnesses were failing and there was a huge expense of public money involved.[106] The fact that those charged with indictable offences were not convicted in the circumstances outlined above raised some concern at the fact that these defendants were under considerable suspicion for over a year. If convicted there was the prospect of a jail sentence. The maximum sentence for riot was life imprisonment.

England now has an independent Crown Prosecution Service. At the time of the miners' strike decisions on prosecuting individuals were taken by lawyers employed directly by the police authorities. It may be that an independent prosecuting service will review police evidence more objectively in the future. Further the common law offences of riot and unlawful assembly have now been codified in the Public Order Act 1986[107] which will be discussed below.

Another aspect of the treatment of alleged offenders during the miners' strike gave cause for concern. At the Mansfield magistrates court bail for those charged was routinely given on the condition that those charged would not picket or demonstrate at any premises of the National Coal Board in pursuance of the dispute, other than peaceful picketing at their own place of employment. In R v. The Mansfield Justices ex parte Sharkey[108] nine striking miners who had been charged under section 5 of the Public Order Act 1936 challenged the bail conditions. All the defendants were of good character.

The ground on which the bail conditions were challenged was that the justices had not exercised their discretion judicially. Individual circumstances were not considered so that the justices were virtually making it a policy to apply the same conditions in every case. It was also alleged that there was insufficient material before the justices to justify the imposition of the condition.

The Divisional Court refused to set the bail conditions aside. It was held that the magistrates had only to perceive that there was a real risk an offence would be committed if they did not set bail conditions. In order to answer the question as to how real the risk was the Chief Justice stated that the magistrates were[109] "entitled to use their knowledge of events at local collieries during the preceding weeks, because it was only on the basis of that knowledge (inter alia) that they could properly reach a conclusion as to the necessity of imposing a condition". As the magistrates were probably not frequent visitors to the areas being picketed it is fairly safe to assume that the bulk of their "knowledge" came from media reports and police evidence. Taking judicial notice of facts publically known is an established practice of the judiciary; however whether the practice should extend to contentious issues reported often in a sensationalist and biased manner is a different matter entirely. Bail conditions are intended to be applied individually and defendants should be judged separately. They should not be judged by violent picket line scenes appearing on the evening news.

Another aspect of the magistrates decision upheld by the Divisional Court were the terms of the bail conditions. As so often occurs in this area of labour law the civil and criminal laws become intermingled. The conditions forbade the defendants to attend any place to picket peacefully other than their own place of work. As one commentator has pointed out[110] the conditions restrict picketing to conduct within section 15 of TULRA. Although conduct outside the section would be tortious it would not be a criminal offence. The magistrates had no jurisdiction when deciding a criminal case to restrict future picketing conduct in this way. Substantial numbers of pickets appeared at Mansfield magistrates court as it was an area where strikebreakers were working and feelings ran very high. The bail conditions thus affected large groups. The decision of the Divisional Court has implications for the further reduction of the rights of defendants in future industrial dispute situations.

(a) Moss v. McLachlan[111]

Moss v. McLachlan was a case based on an alleged infringement of a public order offence which was appealed. The background to the case involved the imposition by the police of roadblocks on various roads all over the country. The purpose of the roadblocks was to stop cars carrying groups of miners to picket at collieries where miners were still working. Having stopped the car or bus, often a hundred miles from the colliery to be picketed, the police would instruct the pickets to turn back. According to the police the basis for stopping the vehicles would be that they apprehended a breach of the peace would otherwise occur, i.e. at the colliery to be picketed. If the pickets refused to turn back they would be arrested for obstructing a police constable in the execution of his duty under section 51(3) of the Police Act 1964.

The test case of Moss v. McLachlan[112] arose when a group of miners were stopped on their way to picket in Nottinghamshire. When they refused to turn back they were arrested and subsequently convicted of wilfully obstructing a police constable in the execution of his duty. The appeal to the Divisional Court concentrated on the power of the police to prevent the miners from using the road. It was accepted that the police did have the power to stop and question the drivers.[113] The defendants were thus protesting as to the restrictions on their freedom of movement. The Divisional Court dismissed the arguments of the miners' counsel. The court chose to follow and extend the principles of Piddington v. Bates.[114] In that case the Chief Justice had left to the discretion of the police officer on the spot the question of what steps ought to be taken to prevent a breach of the peace.

In Moss v. McLachlan Skinner J. said as follows,[115]

> The situation has to be assessed by the senior police officers present. Provided they honestly did reasonably form the opinion that there is a real risk of a breach of the peace in the sense that it is in close proximity both in place and time, then the conditions exist for reasonable preventive acting including, if necessary, the measures taken in this case.

In other words the arresting officer could apprehend that a breach of the peace was going to occur at a future time and in a future place and use his discretion to prevent a person from travelling to that place. The Court considered an earlier Court of Appeal decision, R v. Howell[116] where it had been said that a police officer only had a power of arrest where the breach of the peace was committed or apprehended in his presence or was apprehended to be in the immediate future. Skinner J. was of the opinion that R v. Howell[117] had to be read in the light of the judgment in Piddington v. Bates[118] that the police are only justified in taking preventive action where there is a real, not a remote possibility of a breach of the peace occurring. The possibility was real to the police in Moss v. McLachlan because the court ruled that they were entitled to take account of media news and other accounts of the situation at the collieries.

The decision of the Divisional Court gives grounds for concern in several respects. Firstly, in Piddington v. Bates the police officer was actually present at the location of the picketing when he apprehended that a breach of the peace might occur. The comment of the Chief Justice in that case that there must be a real not a remote possibility of a breach of the peace, surely relates to the judgment of the police officer in relation to the situation in front of his eyes. It is therefore misleading to apply the statement of the Chief Justice in Piddington v. Bates to the clear direction by the Court of Appeal in R v. Howell as to the immediacy of the apprehended breach of the peace.

The question now arises as to how immediate the apprehended breach of the peace must be and the answer appears to be open ended. The court gave no guidelines other than to reinforce the absolute discretion of the arresting officer. The judgment represents a severe curtailment of civil liberties not just of pickets, but of anyone the police might stop because of an apprehended breach of the peace. Data collected by other commentators has shown that in some instances miners were travelling to appear in court in the district in which they were arrested and were turned back at roadblocks because the police believed they were going to picket.[119]

The police have had since 1984, new and increased statutory powers in the Police and Criminal Evidence Act.[120] This will be discussed below.

(2) Overlap of the Criminal Law and the Civil Law

The fact that picketing is constrained by both the civil law and the criminal law has inevitably led to an overlap in the way either area of the law is administered and the way the law evolves.

In Thomas v. NUM[121] counsel for the plaintiffs put forward the proposition that the picketing was a criminal offence under section 7 of the Conspiracy and Protection of Property Act 1875 and was therefore tortious.[122] Counsel cited Lyons v. Wilkins[123] in support of his argument. However, Scott J. preferred the view in Ward Lock and Co. Ltd. v. The Operative Printers' Assistants Society[124] that the conduct had to be tortious independently of section 7. Scott J. ultimately found the pickets liable for the tort of harassment. He does not then confirm that the basis for the injunction is a breach of section 7, but this would seem to follow from his finding that the conduct had to be tortious independently of section 7. Scott J. further notes that in his opinion[125]

"...mass picketing is clearly both common law nuisance and an offence under s.7 of the 1875 Act".

The tort of harassment is in fact based upon conduct that is more of a criminal nature than a tortious one. Scott J. describes the situation thus,[126]

> A daily congregation on average of 50 to 70 men hurling abuse and in circumstances that require a police presence and require the working miners to be conveyed in vehicles do not in my view leave any real room for argument. The working miners have the right to go to work. Neither they or any other working man should be required, in order to exercise that right, to tolerate the situation I have described. Accordingly in my judgment the colliery gates picketing is tortious at the suit of the plaintiff or plaintiffs who work at the colliery in question.

Harassment as a tort is therefore based on mass picketing in the Thomas case. If harassment is a tort then the same conduct would be a crime under section 7 of the Conspiracy and Protection of Property Act 1875.

As was shown in the previous chapter the overlap between the criminal and the civil law sometimes manifests itself in criminal cases where defendant pickets put forward the argument that they are acting within the civil law and should not therefore be guilty of criminal conduct. In Thomas v. NUM Scott J. said that,[127]

> After various repeals, amendments and re-enactments the relevant statutory immunity from tortious or criminal liability for acts done

> in the course of picketing is now to be found in s.16(1) of the Employment Act 1980.

This statement is in direct conflict with paragraph 22 of the Code of Conduct and Picketing[128] which states as follows,

> If a picket commits a criminal offence he is just as liable to be prosecuted as any other member of the public who breaks the law. The immunity provided under the civil law does not protect him in any way.

In Kavanagh v. Hiscock[129] and Broome v. D.P.P.[130] it was held that the very specific terms of section 134 of the Industrial Relations Act[131] did not extend to picketing which was outside the terms of the section and was a criminal offence. Two cases in 1983 discussed the relationship of the immunities from liability in the Trade Union and Labour Relations Act to the commission of criminal offences. In Galt v. Philp[132] employees who participated in a sit-in in a hospital laboratory were prosecuted for watching and besetting under section 7 of the Conspiracy and Protection of Property Act 1875. The Sheriff acquitted the defendants on the basis that section 13 of TULRA implied that the acts the defendants were charged with were not wrongful and without lawful authority. The Lord Justice General reversed this decision on the basis that section 13[133]

> ...does not in particular confer immunity from prosecution in respect of acts which are in themselves criminal or in respect of wrongful acts, not in themselves criminal, which form part of the ingredients of a criminal offence.

The acts of the demonstrators were therefore still held to be wrongful and a prosecution was possible under section 7.

In British Airports Authority v. Ashton[134] a group of seven pickets were demonstrating within the perimeter of Heathrow Airport. They were employed at the airport by British Airways and the picketing was in support of a dispute with British Airways. Although it had been agreed with the police that no picketing would take place at control posts, this was exactly what the defendants were arrested for. The pickets were charged under the by-laws of the airport. The first charge was that they had taken part in a public demonstration likely to interfere with the proper use of the aerodrome and the second that they had remained on the aerodrome after being requested to leave by a constable. The defendants argued that section 15 of TULRA (as amended by section 16 of the Employment Act 1980) gave them a statutory right to picket peacefully. The magistrates court agreed with the defendants and acquitted them. The Divisional Court found that the defendants had technically taken part in a demonstration. With regard to the authority of a constable to request them to leave, the court held that the terms of section 15 did not[135]

> ...confer a right to attend on land against the will of the owner of that land. It would be astonishing if Parliament intended that such a right be implied.

Authority for this proposition could only be found from an Irish case in 1908.[136] Accordingly the court remitted the case to the magistrates to determine if the request to leave the airport was reasonable in the circumstances.

The result of the case raises important questions and may be compared to the Supreme Court of Canada decision in Harrison v. Carswell.[137] In that case the court had upheld the right of a shopping mall owner to prosecute a picket for trespass in the mall, even though she was picketing at her place of employment as permitted by statute. The Ashton case is of wider implication than Harrison v. Carswell for all areas in Britain which are privately owned, but where some degree of access is granted to the public. The Divisional Court said,[138]

> The B.A.A.'s ownership (unlike that of a private landowner) is subject to the right of the public to have access for the purpose of taking advantage of the services and facilities provided by the B.A.A. in pursuance of the statutory duty...However, access for the purpose of picketing is not a right to which the B.A.A.s' ownership is subject.

Therefore, despite the wording of section 15 which begins with the phrase "it shall be lawful", the right of the employees to picket at their place of work was held to be subordinate to the ownership rights of the public authority. In this sense the decision actually goes further than Harrison v. Carswell in prohibiting picketing at areas managed by public authorities. The public authority has been designated to manage the land for the purpose of public services which is a different situation to a shopping mall owner who has bought and paid for his property although he allows the public to visit it. It is now known how far the boundaries of Heathrow Airport extend, but presumably it includes the terminal buildings and surrounding area. The nearest place, therefore, that the pickets might legitimately demonstrate would conceivably be at the motorway exit to the airport. Such a far-fetched result is the implication of the

Ashton decision and it is not consistent with the statutory permission to picket at your place of work. As a matter of practicality, surely picketing in a safe place in the vast expanse of Heathrow Airport is better than having pickets in roadways. Presumably the same sort of reasoning would apply to pickets demonstrating within factory premises.

Since the repeal of section 2 of the Trade Dispute Act 1906 in 1971, the proviso for peaceful picketing has been included in the relevant civil labour relations statute. The latest section is the new section 15 of TULRA. Therefore if picketing is carried on peacefully within the terms of section 15 the general view is that there would be protection from prosecution under section 7 of the 1875 Act. However if conduct is found to be outside the terms of section 15 a section 7 offence would be committed. Harassment is a good example as occurred in the Thomas case. Section 15 would not provide protection for such charges as obstructing a police officer or obstructing the highway. The latter charge is interesting because the highway is deemed to include the pavement. The right to peacefully picket within section 15 of T.U.L.R.A. must surely imply that the right can be legally exercised somewhere. However if a picket objected to being arrested on the basis of his rights under section 15 he would probably be arrested for causing a breach of the peace.

On the one hand then civil injunctions against picketing can be based on breaches of criminal law statutes[139] and a tort can be based on criminal activity.[140] On the other hand the civil law which gives a limited right to picket peacefully at your own place of work is not protection against every form of criminal liability - no matter how minor the offence. In case of any doubt the Code of Practice on Picketing now spells out the latter proposition quite clearly.[141]

(3) The Police and Criminal Evidence Act 1984[142] and the Public Order Act 1986[143]

In the first sections of this chapter it was demonstrated how the government justified the limitations imposed on the rights and powers of trade unions. The justification was based on economic theory. The 'new conservatives' also had theories in the area of law and order. In the wake of inner city riots, football hooliganism, vandalism and rising criminal statistics the government view was that more control by the state and the police was necessary. Dramatic media coverage of violent events aided in persuading the population that stricter methods of control were necessary. When the Conservatives published their Election Manifesto in 1979 trade union policy was not characterised as a law and order issue.[144] However violent picket line scenes as portrayed by the media in the late 1970s and the 1980s[145] undoubtedly added to the general feeling advocated by the Conservative Government that drastic measures were necessary.

Unfortunately the two Acts which have been passed to deal with the perceived problem merely increase the powers and the discretion of the police. The Acts are strictly penal in nature and make no contribution to solving any underlying problems.[146] So far as the conduct of picketing is concerned both Acts are relevant. Those sections which are more directly relevant are set out in Appendix 1.

(a) The Police and Criminal Evidence Act 1984 (henceforth PACE) was intended to clarify police powers and define a scheme for complaints to be made about the police. The Home Secretary has written that[147] "...the Act is concerned equally with police powers and civil liberties...". Closer study of the Act reveals however that civil liberties are more often subordinated to police powers. A clear illustration of this is section 4 which deals with the power of the police to impose roadblocks. The section is set out in full in Appendix 1. Section 4 essentially sanctions the use of the general police power in section 159 of the Road Traffic Act 1972 to stop vehicles, as a method to impose a road check and search vehicles. Section 4(1) provides that a roadblock may be imposed for police officers to ascertain whether a vehicle is carrying

> (1) a person who has committed an offence other than a road traffic offence or a vehicles excise offence;
> (2) a person who is a witness to such an offence;
> (3) a person intending to commit such an offence; or
> (4) a person who is unlawfully at large.

The section thus sanctions the actions of the police in a case like Moss v. McLachlan[148] where a roadblock was set up to stop miners travelling to picket lines. A police officer of the rank of superintendent or above may use his discretion to authorize a roadblock if he is of the opinion that a serious arrestable offence may be committed. Section 116 includes in the definition of serious arrestable offence, serious harm to public order, serious injury to any person and serious financial loss to any person. The injury and loss are to be judged according to their effect on the victim. The combination of these subsections thus gives to the police a considerable amount of discretion as to when a road check is imposed. The only apparent redress for the person in charge of the vehicle stopped is to apply within one year for written reasons from the police. The latter provision applies only to the person in charge of the vehicle at the time it was stopped and not to any other passengers.

Section 4 of PACE makes no mention of how imminent the risk must be that a serious arrestable offence will be committed. In Moss v. McLachlan[149] in the case of the offence of breaching the peace it was said that the possibility of a breach must be real to justify any preventive action. One commentator has suggested that that ruling will prevent pickets being stopped in the future as much as one hundred miles from the site of a picket line.[150] However the perceived threat to public order may be just as real one hundred miles away as two miles away. The only problem for the prosecution might be in proving that the vehicle was not going somewhere else. The nearer the vehicle to the picket line, the easier it will be to prove that is where it is heading. The question of imminency will therefore be an issue that will turn on the facts of each individual case.

Having considered section 4 of PACE it is difficult to see how this particular section of the Act enhances civil liberties as the Home Secretary stated.[151] The majority of the public would probably welcome a restriction on their freedom of movement if the purpose was to catch a terrorist, a murderer or a hi-jacker. When freedom of movement is restricted however on the basis that the police feel a public disturbance might arise there is good cause for serious concern that the powers of the police are being unnecessarily expanded. It should be remembered also that those who the police stop at roadblocks may in fact be going to practice lawful picketing within the terms of the civil statutes.[152]

Other sections of the Act which give cause for concern are the newly defined powers of the police to search persons, property or vehicles and seize goods. In many circumstances the police do not require a warrant to exercise their powers.[153] The power of arrest has also been redefined. For less serious offences such as those mainly associated with picketing, there is now a general power to arrest for any offence that a police officer reasonably suspects has been committed or attempted.[154] Arrest without summons is permitted in a number of given statutory cases. One of these cases is that the constable has reasonable grounds to believe that an arrest is necessary to prevent the suspect from causing an unlawful obstruction of the highway. It would seem to follow that all pickets are henceforth liable to arrest on the spot without a summons.

The remainder of the Act deals with suspects rights when detained, criminal evidence and police accountability.

(b) The Public Order Act 1986[155] redefines the common law offences relating to public order and revises the previously existing statutory offences. The Act followed a report of the Law Commission[156] and is quite remarkable for the considerable degree of discretion it affords to on-the-spot police officers.[157]

In Part I of the 1986 Act the common law offences of riot and affray are redefined and a new offence of violent disorder is introduced. Riot is now committed by at least twelve people using or threatening unlawful violence for a common purpose. The effect must be to cause someone of reasonable firmness at the scene to fear for his personal safety. The problems experienced by the police in securing convictions of riot after the 1984-5 miners strike[158] are not alleviated by the new section. It still has to be shown that each defendant took part in the riot. In contrast the offence of violent disorder in section 2 only requires common intent by three people and does not have to take place in the presence of the person actually threatened. Thus a person throwing something could be arrested for the offence even if the police officer did not see where the missile landed. In theory therefore it should be easier to secure a conviction under section 2 than under section 1 for riot.

Section 3 of the Act defines the offence of affray which involves one person using or threatening unlawful violence towards another. In the context of labour disputes the offences of riot, violent disorder and affray will generally be used in connection with violent picketing. It is therefore to be hoped that the police will exercise their discretion of whether or not to arrest demonstrators for these offences a little more carefully than during the 1984-5 miners strike.

With regard to the expanded powers of the police the new offences in sections 4 and 5 are of more concern. Section 5 of the Public Order Act 1936 containing the offence of conduct likely to lead to a breach of the peace is repealed[159] and replaced by two new offences in sections 4 and 5 of the 1986 Act. The section 4 offence is committed where a person uses threatening, abusive or insulting words or behaviour towards another or displays to another a sign or writing that is threatening abusive or insulting. The offender must have the intent to cause the other person to believe that immediate unlawful violence will be used against him or have the intent to provoke the other person or another to use unlawful violence. The offence may be committed in a public or private place except a dwelling.

The new section 4 thus replaces 'breach of the peace' with violence. A very definite mens rea requirement is provided for by section 6(3). A person is only guilty of the offence if he intends his behaviour to be threatening. The requirement to prove intent may raise some questions as to whose standard is to be used to decide if the behaviour is insulting or not.[160] If violence is thereby provoked on the part of others present, it is apparently the person provoking the behaviour who is to blame for the behaviour of the others.

Section 5 is the lesser offence of offensive conduct. The behaviour of the offender is the same as that required for section 4. That is threatening, abusive, insulting words or behaviour, disorderly behaviour, the display of writing or a sign that is threatening, abusive or insulting. This time the behaviour must be in the hearing or sight of a person likely to thereby be caused harassment, alarm or distress. It has been noted that this offence is extremely vague. The government apparently did not intend to include merely high spirited people,[161] but there will be obvious difficulties in establishing where the boundary lines of the offence are. For example picket lines can often be a nuisance and an inconvenience to people living nearby. People may be alarmed at the sight of crowds demonstrating outside their houses. The term harassment brings to mind the new tort of harassment developed in Thomas v. NUM.[162] Section 5 may also be used against those who picket the place of work of strike breakers.

A person may only be arrested under section 5 if a constable has warned him first and he then persists in the conduct. There will be obvious difficulties where a person misunderstands that he is being warned or protests his innocence. The offence gives considerable discretion to the arresting officer in deciding whether the conduct is disorderly conduct. Unless cases are appealed, which is unlikely without the backing of an organization such as a trade union or without legal aid, the offence of disorderly conduct will be dealt with by magistrates. It may therefore be sometime before it is clear whether or not the police are abusing their discretion and before guidelines are laid down by case law as to how far the offence extends.

Part II of the Act deals with processions and assemblies. This part has been subject to criticism by the National Council for Civil Liberties in particular.[163] One of the fundamental criticisms is that in protecting the majority who will not be demonstrating at any given time, the Act is going too far in restricting the rights of the minority who do want to demonstrate. Once again much discretion is left in the hands of the police. Section 11 requires advance notice to be given to the police of public processions except those customarily held. Section 12 redefines the power that was previously in section 3 of the Public Order Act 1936, for the police to impose restrictions on processions.

A more important section with regard to picketing is section 14 which allows the police to impose conditions on public assemblies. Public assembly is defined as a group of twenty or more people in a public place and will therefore include a picket line if twenty people are present. If fewer than twenty people are present the police still possess the common law power as enunciated in Duncan v. Jones[164] to move along even those who are picketing lawfully, if it is necessary to prevent a breach of the peace.

Section 15 enables the police to move an assembly on the ground that the assembly might result in serious public disorder, serious damage to property or disruption to the life of the community or the purpose of those organizing the assembly is to intimidate others. In order to prevent the perceived disruption the police officer can move the assembly or provide limits on its duration and size. During the dispute with News International Ltd. at their Wapping premises in 1986, the union organized the picketing to take place predominately on a Saturday night when the trucks left to deliver Sunday newspapers to the rest of the country. There is no doubt that the community around Wapping was disrupted by the presence of both police and pickets. If the same situation occurred now a senior police officer could insist that the demonstration take place on Sunday afternoon instead. Such a condition would have destroyed the purpose and effectiveness of the picketing. Such an order would be almost equivalent to a civil injunction.

It is still open to a union to seek judicial review of a decision made by the police regarding a public assembly. The drawback to this avenue of redress is that by the time the case is heard the time for the march or assembly will be long gone and the opportunity to protest will be lost.

Two further provisions of the 1986 Act should be mentioned. The offence of obstructing a police officer in the execution of his duty is expressly preserved by section 40(4). In schedule 2, section 7 of the Conspiracy and Protection of Property Act 1875 is made an arrestable offence. Pickets may therefore now be arrested for an even wider range of criminal offences on the picket line. Previously arrest had to be on some other ground even though a charge under section 7 might later be made out. The offence of watching and besetting was used considerably during the 1984-5 miners strike, particulary to deal with the picketing of the homes of strikebreakers.[165] The addition of a power of arrest will reinforce the use of the section in that respect.

Since the Public Order Act has been in force a major industrial dispute with picketing on a large scale has not occurred in Britain. It therefore remains to be seen how the police will exercise their new powers and whether the result is to escalate tension on the picket line.[166]

IV Conclusion

It is clear that during the 1980s the trend noted at the end of Chapter 2 has continued. That is to say that the rights of those who wish to demonstrate are deemed by statute and case law to be subordinate to the rights of others, be they employers, fellow workers or the public at large.

The philosophy of the newly elected Conservative Government in 1980 coincided with and complemented the attitude of many judges who felt that the statutory protection afforded to the unions under TULRA was too wide. The new statutory regime enacted during the 1980s saw the government taking the initiative as far as the law relating to trade unions was concerned. This was a reversal of the pattern that had previously existed whereby the government would legislate to protect trade unions from case law developed specifically in relation to trade unions.

The practice of picketing received more attention than it had in previous statutes. Not only was a new statutory section enacted which considerably narrowed the circumstances when an individual could lawfully picket, but an entire Code of Practice on Picketing gave guidance to employers, pickets and police. In practice it is now clear that the Code is going to be used by the courts virtually as a statute, although this was apparently not the intention of those who wrote the Code.

In applying section 16 of the Employment Act 1980 to picketing the courts have thus far been extremely strict and fairly lax at the same time. Thus a persons' "own place of work" has been strictly interpreted to exclude premises that the person would have worked at had he not been dismissed. On the other hand the requirement that industrial action be authorized by specific bodies or officers of the union has been ascertained by the courts from dubious sources of evidence such as newspaper reports.

The common law with regard to picketing has not stood still. One feature of the 1984-5 miners strike was the division between striking and working miners. A legal action by working miners succeeded in imposing an injunction against pickets on the basis of the new tort of harassment. The tort has yet to be confirmed by higher than a first instance court, but is an example of how the judges will expand the common law to cover an area that the legislators missed. The courts have also been active in their development of the rules for the granting of interlocutory injunctions. The balance of convenience test which greatly favours the effect of the financial loss to a plaintiff during a dispute has never been entirely ruled out in labour dispute cases. However in the Dimbleby case Lord Diplock went further and reverted to the principle in American Cynamid that the plaintiff has only to establish that there is a serious issue to be tried. Given the increased vulnerability of trade unions pursuing industrial action under the new statutes, it will not be difficult for plaintiffs to establish a serious issue in the future.

So far as the criminal law relating to picketing is concerned in the 1980s the police have been given increased powers to arrest pickets, impose roadblocks, determine the location and number of pickets and adjudicate on the conduct of marches and demonstrations. During the 1980s in Britain there has been general public concern over issues of law and order. The government in attempting to codify the law of public order offences has undoubtedly further restricted the circumstances when pickets may peacefully demonstrate. The criminal law and the civil law now overlap more than ever with regard to picketing. The result is that any group of pickets in excess of six may be liable for any one of a number of torts including the new tort of harassment. Any picket may be arrested for a variety of public order offences, even whilst acting within the civil law. A more serious threat to the union as a whole is the financial risk of fines, damages and sequestration of assets.

It seems that the practice of peaceful picketing has been sacrificed to ensure that others can practice their own freedoms in every area of law discussed above. In the majority of cases there has been little, if any discussion of freedom of assembly, and freedom of expression on the part of pickets. These are ideals to be discussed only in the context of international conventions and not to be applied in practice. Further, there is no indication that in the immediate future this trend will change.

FOOTNOTES - CHAPTER 3

1. See e.g. Torquay Hotel Co. Ltd. v. Cousins [1969] 2, Ch. 106, Rookes v. Barnard [1964] 1 All E.R. 367, Duport Steels Ltd. v. Sirs [1980] 1 All E.R. 529.

2. See e.g. Piddington v. Bates [1960] 3 All E.R. 660, Tynan v. Balmer [1965] 3 All E.R. 99, Broome v. D.P.P. (1974) A.C. 587.

3. 1974 (U.K.) c. 52. See Appendix 1.

4. [1975] 2 W.L.R. 316.

5. [1975] 3 All E.R. 1.

6. S. 14 T.U.L.R.A. supra n. 3.

7. BBC v. Hearn [1977] I.C.R. 685.

8. [1979] I.R.L.R. 201. Lord Denning also held in this case that a failure to resort to statutory recognition procedures was also a basis for liability (at p. 305) with reasoning similar to that of his Canadian brethren. However this has been criticized (see note by B. Doyle (1979) 8. I.L.J. 173) and is probably not correct as there is no duty on unions to use the procedure.

9. [1979] I.C.R. 210.

10. [1979] I.C.R. 755.

11. [1980] 1 All E.R. 529.

12. [1979] I.C.R. 210.

13. [1979] I.R.L.R. 110.

14. [1978] I.R.L.R. 34.

15. [1980] 1 All E.R. 65.

16. [1979] 3 All E.R. 614.

17. [1980] 1 All E.R. 529.

18. For commentary on these decisions see K. Ewing 'The Golden Formula: Some Recent Developments' (1979) 8 I.L.J. 133, R.C. Simpson 'NWL Ltd. v. Woods' (1980) 43 M.L.R. 319.

19. NWL Ltd. v. Woods [1979] 3 All E.R. 614 at 624.

20. Duport Steels Ltd. v. Sirs [1980] 1 All E.R. 529 at 554.

21. Kahn, Lewis, Livock and Wiles Picketing, Industrial Disputes, Tactics and the Law (1983) at p. 13.

22. Industrial Relations Act 1971 (U.K.) c. 72.

23. Code of Practice on Picketing S.1. 1980 No. 1757. See also C.D.C. 'Code of Practice on Picketing, Guidance or Gloss' (1981) 10, I.L.J. 46.

24. Public Order Act 1986 (U.K.) c. 64.

25. For a fuller description of these theories see Kahn et al., supra n. 21 at 21-7 and K.W. Wedderburn 'Labour Law Now - A Hold and a Nudge' (1984-5) 14-15 I.L.J. 73 at 78.

26. F.A. Hayek 1980s Unemployment and the Unions' (1980), 'Law, Legislation and Liberty (1979).

27. See Clark and Wedderburn 'Modern Labour Law: Problems, Functions and Policies' in Clark, Wedderburn and Lewis Labour Law and Industrial Relations: Building on Kahn Freund (1983) at 141, Lewis and Simpson Striking a Balance - Employment Law after the 1980 Act (1981) at 6-7, Simpson 'Trade Union Immunities' in Lewis Labour Law in Britain 1986 at 192. See also K.W.Wedderburn 'the New Policies in Industrial Relations Law' in Fosh and Littler Industrial Relations and the Law in the 1980's (1985) at 26.28 and 'The New Industrial Relations Laws in Great Britain' (1985) 10 Lab. and Soc. 45 at 46-48 for an explanation as to why the British system developed in this way.

28. It should also be noted that the torts that the unions had 'immunities' from were primarily developed to apply only to trade unions in any event so that the 'immunities' put the unions in the same position as everyone else. Ewing 'Trade Unions and the Constitution: The Impact of the New Conservatives'.

29. 'Trade Union Immunities' Cmnd. 8128, January 1981.

30. 1980 (U.K.) c. 42.

31. Ibid.

32. See Appendix 1.

33. Ibid.

34. B. Bercusson 'Picketing, Secondary Picketing and Secondary Action' (1980) 9 I.L.J. 215 and K.W. Wedderburn 'Secondary Action and Gateways to Legality' 1981, 10 I.L.J. 113.

35. Saloman v. Saloman [1897] A.C. 22. In one earlier case, Examite Ltd. v. Whitaker [1977] I.R.L.R. 312, Lord Denning had been willing in a trade dispute case to 'pierce the veil' of limited companies but an obstacle to this is now s. 17(4) of the 1980 Act, which allows some secondary action against an associated company of a company party to the dispute. Lord Diplock stated that the subsection would be irrelevant if the companies were to be treated as one entity for the purpose of secondary action in Dimbleby and Sons Ltd. v. National Union of Journalists [1984] 1 W.L.R. 427.

36. Supra n. 23.

37. Supra n. 23, Section A, para. 1.

38. See infra, Thomas v. NUM [1985] I.R.L.R. 136.

39. Supra n. 23, Section E, para. 31.

40. Supra n. 23, Section C, para. 22.

41. Supra n. 23, Section D, para. 26.

42. 1982 (U.K.) c. 46.

43. See Appendix 1.

44. Supra n. 42, s. 15(3) - (7).

45. See Appendix 1.

46. See e.g. House of Lords decision in Garden Cottage Foods Ltd. v. Milk Marketing Board [1984] A.C. 130.

47. See K.W. Wedderburn, The Worker and The Law (3rd ed. 1986), p. 696-8.

48. A writ of sequestration was first introduced in the Court of Chancery in the 17th century. It is now provided for by the Rules of the Supreme Court and is a process of contempt. It operates against property only, and is available only for civil contempt.

49. See J. Jacob, 'Sequestration for Contempt of Court' (1986) 39, Curr. Legal Probs, 219 at 221.

50. See e.g. the News International dispute at Wapping in 1986.

51. See Appendix 1.

52. S. 18(2).

53. See Appendix 1.

54. See Appendix 1.

55. 1984 (U.K.) c. 49.

56. P. Edwards 'Industrial Action 1980-84' (1987) 25, B.J.I.R. 287.

57. E.g. the dispute at the Messanger Newspapers Group Ltd. in Stockport in 1983. See Messanger Newspapers Group Ltd. v. National Graphical Association (1982) [1984] IRLR 397.

58. In giving evidence to the Select Committee on Employment 1979-80, the Chief Constable of South Wales said as follows:

> Quite frequently there are occasions when pickets are there in large numbers and all is peaceful and no great difficulties are caused. They are sometime there for comradeship and solidarity. You must not assume that on every occasion there is a mass picket there is going to be trouble. You sometimes get a very jaundiced picture from the news media who tend to highlight the occasions when things go wrong, but this is by no means the same because there are many other incidents which pass off day by day without any difficulty whatsoever.

Minutes of Evidence, 462 (ii), 27 February, 1980, p. 39.

59. [1982] I.R.L.R. 152. See also Kahn et al. supra n. 21 at 177-9.

60. [1899] 1 Ch. 255.

61. (1906) 22 T.L.R. 327.

62. See minority judgment of Denning M.R. in Hubbard v. Pitt (1975) 3 All E.R. 1.

63. Supra n. 59 at 154.

64. Supra n. 62.

65. Supra n. 62 at 19.

66. [1985] I.R.L.R. 136.

67. Ibid.

68. See Fosh and Littler Industrial Relations and the Law in the 1980s (1985) at p. 8 for background.

69. Proceedings for contempt were instituted but later withdrawn. The purpose was to do as little as possible that could have the effect of uniting the unions.

70. See also Clarke v. Chadburn [1984] I.R.L.R. 350, Taylor v. N.U.M. [1984] I.R.L.R. 440, Taylor and Foolstone v. N.U.M. [1984] I.R.L.R. 440, Taylor v. N.U.M. [1985] I.R.L.R. 136.

71. (1906) 22 T.L.R. 327.

72. [1985] IRLR 136 at 148.

73. See discussion of case by R.D. Hendry 'The Liability of the Masses' (1985), 7, Liv. L.R., 156.

74. Ibid.

75. Supra n. 37.

76. [1986] I.R.L.R. 337.

77. [1985] I.R.L.R. 136.

78. Supra n. 76 at 348.

79. This was the situation in the Wapping dispute. After obtaining the injunction in News Group Newspapers Ltd. v. SOGAT'82 [1986] I.R.L.R. 337 the employer threatened to sue for contempt unless terms of settlement were reached. The fines for contempt could possibly have bankrupted the unions involved. See The Guardian 6th Feb. 1987 and (1987) 25 B.J.I.R. 303.

80. [1985] I.R.L.R. 67. See discussion in Benedictus 'The Use of the Law of Tort in the Miners Dispute' (1984-5) 14-15 I.L.J. 176.

81. [1986] I.R.L.R. 337.

82. [1975] 2 W.L.R. 316.

83. [1975] 3 All E.R. 1.

84. [1978] I.R.L.R. 507 at 511.

85. [1979] 3 All E.R. 614.

86. Ibid.

87. See Appendix 1.

87a. Supra n. 85 at 626.

88. [1980] 1 All E.R. 529.

89. Ibid at p. 531.

90. [1984] 1 W.L.R. 427.

91. S. Evans 'The Use of Injunctions in Industrial Disputes' (1985) 23, B.J.I.R. 133 and (1987) 25, B.J.I.R. 418.

92. See Appendix 1.

93. Supra n. 90.

94. Supra n. 90 at 431.

95. Supra n. 90 at 432.

96. [1986] I.R.L.R. 337.

97. Ld. Wedderburn The Worker and The Law (3rd ed. 1986) at 717.

98. See Chapter 6 for the new proposals for trade union members to take action against their unions.

99. See P. Wallington 'Policing the Miners' Strike' (1984-5), 14-15 I.L.J. 145.

100. Ibid at p. 150.

101. Supra n. 99 at p. 150.

102. E.g. R v. Mansfield Justices ex. p. Sharkey [1984] I.R.L.R. 496 on bail conditions.

103. See The Observer 21/7/85.

104. Ibid.

105. Ibid.

106. See The Observer 21/7/85, The Times 18/7/85, 19/7/85, 22/7/85, 6/8/85.

107. 1986 (U.K.) c. 64.

108. Supra n. 102.

109. [1984] I.R.L.R. 496 at p. 501.

110. G.S. Morris 'Picketing and Police Powers' (1984-5), 14-15 I.L.J. 109 at p. 111.

111. [1985] I.R.L.R. 76.

112. Ibid.

113. This power was in section 159 of the Road Traffic Act 1972.

114. [1960] 3 All E.R. 660.

115. Supra n. 111 at p. 78.

116. [1982] Q.B. 416.

117. Ibid.

118. Supra n. 114.

119. East and Thomas 'Freedom of Movement: Moss V. McLachlan' (1985), 12 J. of L and Soc. 77.

120. 1984 (U.K.) c. 60.

121. [1985] I.R.L.R. 136.

122. Ibid at p. 146.

123. [1899] 1 Ch. 255.

124. (1906) 22 T.L.R. 327.

125. Supra n. 121 at p. 153.

126. Supra n. 121 at p. 149.

127. Supra n. 121 at p. 147.

128. Supra n. 23.

129. [1974] 2 All E.R. 177.

130. (1974) A.C. 587.

131. 1971 (U.K.) c. 72.

132. [1982] I.R.L.R. 456.

133. Ibid at p. 159.

134. [1983] 1 W.L.R. 1079 and see Kahn 'Peaceful Picketing' (1984) 128 Sol. J. 91.

135. Ibid 1086.

136. Larkin v. Belfast Harbour Commissioners [1908] 2, I.R. 214.

137. [1976] 2, S.C.R. 200.

138. [1983] 1 W.L.R. 1079 at 1087.

139. See e.g. Lyons v. Wilkins [1896] 1 Ch. 811, [1899] 1 Ch. 255.

140. Thomas v. N.U.M. [1985] I.R.L.R. 136.

141. Supra n. 23 para. 22.

142. 1984 (U.K.) c. 60.

143. 1986 (U.K.) c. 64.

144. M.D.A. Freeman 'Law and Order in 1984' [1984] Curr. Leg. Probs. 1975 at 183.

145. E.g. during the miners strike of 1983 and 1984-5, and the Messanger Newspaper Group dispute at Warmington in 1983.

146. For a sociological discussion of the possible root causes of unrest see the article by M.D.A. Freeman supra n. 144.

147. The Rt. Hon. Leon Brittan, Q.C., M.P. 'A Broad Overview' [1985] Pub. L. 389 at 390.

148. [1985] IRLR 76

149. Ibid.

150. P. Wallington 'Policing the Miners' Strike' (1984-5) 14-15 I.L.J. 145 at 155.

151. Supra n. 137.

152. For further comments on PACE see [1985] Crim L. Rev. 535-588; [1985] Pub. L. 388-454; (1985), 48 M.L.R. 679.

153. See L.H. Leigh "Search Entry and Seizure" [1985] Crim L. Rev. 535.

154. Police and Criminal Evidence Act 1984 (U.K.) c. 60, s. 25(3)(d)(v).

155. 1986 (U.K.) c. 64.

156. Report no. 123, Criminal Law: Offences Relating to Public Order 1983.

157. See P. Wallington 'Some Implications for the Policing of Industrial Disputes' [1987] Crim. L. Rev. 180.

158. See supra n. 106.

159. Schedule 3 Public Order Act 1986.

160. See A.T.H. Smith 'The New Offences' [1987] Crim. L. Rev. 156 at 163-4.

161. Hansard H.C. Vol. 89 Col 796.

162. [1985] I.R.L.R. 136.

163. See P. Thornton We Protest 1985, M. Stauton Trade Unionists: How the Public Order Proposals Affect You 1985 and Free to Walk Together 1985. All N.C.C.L. publications.

164. [1936] 2 K.B. 218.

165. See Wallington supra n. 157 at p. 185.

166. For further discussion on the Public Order Act 1986 see Bonner and Stone 'The Public Order Act 1986: Steps in the Wrong Direction' 1987 Pub. L. 202, [1987] Crim L. Rev. 153-193, A.T.H. Smith 'Public Order Law 1974-1983: Developments and Proposals' [1984] Crim L. Rev. 643, G. Zellick 'Public Order Law, Principles and Problems' [1986] Pub. L. 177. At the time of writing (May 1988) there is a major strike concerning members of the National Union of Seamen. However no details of criminal prosecutions are yet available.

CHAPTER 4 - ALBERTA LEGISLATION AND CASE LAW UNTIL 1979

I Introduction

In terms of numbers and organization, the labour movement was not as advanced in Canada as it was in England at the turn of the century. During the nineteenth century the slow[1] growth of unionism in Canada was influenced by the developments in England, and by immigrants from England and the United States with experience in that field from their native countries. Also of influence, particularly in the latter half of the nineteenth century, was the spread of unions from the United States into Canada, producing the phenomenon of international unions.[2]

The legal position of trade unions at the turn of the century was very similar to that in England. The criminal law was used by the state to control the aspirations of the unions. In 1872, the printers at the Toronto-based newspaper 'The Globe and Banner' went on strike when their demands for a shorter work week and increased wages were refused. Following a mass rally, 24 members of the Printer's Vigilante Committee were convicted for being members of an illegal body, that is, a combination in restraint of trade. There were calls from the labour movement for political action and as a result the Trade Union Act[3] and Criminal Law Amendment Act[4] were passed.[5] These Acts were based on the British Acts of 1871 of the same name.[6]

The Trade Union Act provided[7] that for a registered union there was to be no criminal liability merely because its purposes were in restraint of trade. The Criminal Law Amendment Act created the offences associated with picketing[8] which included using violence to person or property, intimidation, molestation and watching and besetting. The offence was complete when one of the above acts was done with a view to compelling a workman or a master to do something, such as not work or not hire a worker. There was no provision for peaceful picketing. As most unions did not register under the Trade Union Act, both pieces of legislation were a 'dead letter' as far as the unions were concerned.[9]

As in England, trade unionists began to see that what they needed was a voice to speak for them in government. Such a political group was not formed until 1932 when the Co-operative Commonwealth Federation was founded in the western provinces.[10] After the C.C.F. party was dismantled in the 1950s the New Democratic Party was formed in 1961. However, back in the late 1800s the idea of a political pressure group led to the combination of a sufficient number of unions in the Canadian Labour Union for the Liberal Government to court its favour by passing Criminal Law Amendment Acts in 1875[11] and 1876.[12] The 1875 Act excluded criminal conspiracy for acts done for the purposes of a trade combination.[13] The 1876 Act followed the example of the British Conspiracy and Protection of Property Act 1875[14] by adding a proviso for peaceful picketing to obtain or communicate information.[15]

The criminal law was codified in 1892[16] and the provisions dealing with picketing were included:

> s. 517. The purposes of a trade union are not, by reason, merely that they are in restraint of trade, unlawful within the meaning of the next preceding section.
> s. 512. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an act punishable by statute.
> s. 523. Everyone is guilty of an indictable offence and liable on indictment or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars or to three months' imprisonment with or without hard labour who, wrongfully and without lawful authority with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain -
> (a) uses violence to such other person, or his wife or children, or injures his property; or
> (b) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or
> (c) persistently follows such other person about from place to place; or
> (d) hides any tools, clothes or other property owned or used by such other person or deprives him of, or hinders him in the use thereof; or
> (e) with one or more persons, follows such other person, in a disorderly manner, in or through any street or road; or
> (f) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

There was no longer a requirement of registration so that all trade unions were freed from liability for criminal conspiracy. However the proviso for peaceful picketing which had been in the 1876 Act was not re-enacted in section 523. In this respect the Canadian trade union member was more handicapped than his British counterpart at the beginning of the century. That difference aside the tenor of the legislation, was very similar to the British statutes.

When civil legislation was passed concerning trade unions, a British model was once again used. The federal Conciliation Act of 1900[17] provided for voluntary conciliation or arbitration. The Act was not successful[18] because it was imposed by government policy and was not backed up by an extensive history of voluntary collective bargaining as were the corresponding British statutes.[19] It is interesting to compare the nature of the Conciliation Act with British labour relations statutes. Until the 1970s the British legislation was largely a manifestation of the law that the unions wanted, albeit to reverse judicial decisions. In Canada, successive governments have taken a much more interventionist role and imposed a regulatory system of collective bargaining on the unions. In view of the late development of Canadian unions as compared to the British, the Conciliation Act was probably ahead of its time in Canada. The provisions of the Act, however, greatly appealed to the then Deputy Minister of Labour, Mackenzie King. He saw the resolution of disputes as being extremely important, even if the issues causing the dispute were not resolved.

Early legislation also reflected the geographical nature of Canada. The size of the country made railways at this time important methods of communication. As a result of a long strike by trackmen on the Canadian Pacific Railroad in 1903, the Railway Labour Disputes Act[20] was passed. The Act was limited to the railway industry and provided for compulsory arbitration. This Act and the Conciliation Act of 1900 were consolidated in 1906 as the Conciliation and Labour Act.[21]

Whereas at this time most unions in Britain had already fought battles regarding recognition, Canadian unions, particularly in the west, were still engaged in this preliminary issue. In Alberta, the first trade unionists had been the railwaymen[22] and it was not until the turn of the century as the population increased, that unionism began to develop in the province. In the coal mines of southern Alberta work conditions were very poor, making the mines fertile ground for the organizing efforts of American unions. A bitter strike concerning recognition of the United Mineworkers of America ensued in 1906 and developed to the point where the lack of fuel supplies was a serious problem to the people of Saskatchewan. The Deputy Minister of Labour, Mackenzie King, was dispatched to Alberta from Ottawa and assisted in a compromise solution to the strike.[23] As a result of the observations he made about the strike, Mackenzie King afterwards presented his plan to the Federal Government for the future government of labour relations in Canada.[24] The plan was designed to overcome what he saw as the main cause of such prolonged strikes, that is the fact that the two sides did not talk to each other.

In the resulting Industrial Disputes and Investigation Act of 1907,[25] the dominant feature was that any dispute in certain key industries[26] had to be reported to a board of conciliation and mediation. Any strike or lockout before the board made a report was unlawful. This was a pre-emptive condition which was designed to give both sides a cooling-off period and hopefully avert a strike. At a time then when the British government had passed the Trade Dispute Act 1906[27] which dealt with the legal position of the union after a strike and strike activity had ensued, the Canadian government was more concerned with the situation before the strike actually occurred. It is still true today that[28] "the delay of the work stoppage is still a prominent feature of Canadian labour legislation and distinguishes it from American and British law."

The Industrial Disputes and Investigation Act did not work well.[29] Submission of a dispute did not aid or guarantee recognition and there were delays in reports being compiled with the inevitable complaint of employer bias. It is some measure of the early development and fragmentation of Canadian unions at this time that no effective opposition to the Act was ever raised, and it continued to exist until 1925. One commentator[30] has seen the decentralization of Canadian unions in the early 1900s as a crucial factor in the dependence of the unions on government to protect their right to organize. This statement is reinforced by comparing the entirely different nature of the British legislation existing in 1907. In Britain the unions and not the government were to a greater extent the arbiters of how much legislation was necessary. Also, the legislation in Britain was in response to somewhat different needs than the Canadian legislation and occurred at a different stage of development of the trade union movement.

II Development of the Civil Law

(1) Liability in Tort

(a) Conspiracy

As was shown in the introduction to this chapter trade unions were freed from liability for criminal conspiracy when the Criminal Code was enacted in 1892.[31] So far as civil conspiracy was concerned the Canadian judiciary were keen to introduce this head of liability into Canadian labour law at the beginning of the twentieth century just as their English counterparts had done. Simple conspiracy as enunciated in the British case of Quinn v. Leatham[32] was frequently termed "conspiracy to injure" in Canada. The essence of the tort is that action by a group is tortious even if such conduct would not be tortious if committed by an individual.[33] Conspiracy to use unlawful means was also adopted in Canada where a new dimension was added to the tort. The Canadian courts accepted that inducing breach of contract and intimidation could constitute unlawful means. The courts then went further and found that breach of the provisions of a labour relations statute could also constitute unlawful means. A brief look at some of the cases will illustrate how the tort of conspiracy was used in Canada.

In a case that predated Quinn v. Leatham by three years the Supreme Court of Canada implicitly rejected liability for simple conspiracy. In Perrault v. Gauthier[34] up to 25 men withdrew their labour in protest at the employment of a workman who belonged to a rival union. The workman sued the union alleging a conspiracy to injure. The Supreme Court applied the ratio of the very recent decision of the House of Lords in Allen v. Flood[35] The ratio of the latter case was that a bad motive cannot transform a lawful act into an unlawful one. However Allen v. Flood had involved representations made to an employer by a single union official. Applying the ratio of Allen v. Flood to the group action in the Gauthier case and finding the union not liable, meant that the ratio of the Gauthier case was that for there to be liability in civil conspiracy there had to be acts which would be tortious or criminal if done by an individual.[36]

After Quinn v. Leatham was decided by the House of Lords, the decision in Perrault v. Gauthier appears to have been disregarded by Canadian courts. In the non labour dispute case of Patterson v. CPR,[37] it was alleged that an accountant employee had been dismissed as a result of a conspiracy to injure by fellow employees and the employer. Although the plaintiff lost his application to the Appellate Division of the Alberta Supreme Court because of badly worded pleadings, the principles of Quinn v. Leatham[38] were upheld. It was stated that such a combination between the employer and fellow employees would have been a conspiracy to injure. However unlawful means were also mentioned in the Patterson case. The defendants had committed the conspiracy by inducing the company to break the plaintiff's contract. It is a characteristic of many Canadian cases involving conspiracy that conspiracy to injure and conspiracy to use unlawful means are often confused in this way. This matter will be alluded to below.

It has been noted in Chapter 2 how the use of conspiracy to injure was limited in Britain by section one of the Trades Dispute Act 1906.[39] The use of the tort was further limited by the House of Lords decision in Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch[40] that there was no liability for conspiracy to injure if the predominant purpose of the union was one of legitimate self interest. Although a few Canadian provinces subsequently enacted equivalent provisions to section one of the 1906 Act,[41] the majority including Alberta did not. The ratio of the Crofter case however was applied in relation to conspiracy to injure.

In the case of Corbett v. Canadian National Printing Trades Union[42] the majority of the Appellate Division of the Alberta Supreme Court adopted the ratio of the Crofter[43] case. The Alberta case concerned a group of union members employed by a newspaper publisher who approved an agreement without consulting other members employed elsewhere. A second group of union members did not receive a wage increase and they left the union in protest. Union officials thereafter removed the names of those who had left the union from their employer's "slipboards" which disqualified them from employment there. Harvey C.J.A. delivering the majority decision said,[44]

> It seems clear that at least the predominant purpose of the defendants' acts and contemplated acts, was the protection of the interests of themselves and their fellow members and they were doing

> and proposing to do something which was clearly lawful and by means which were clearly lawful.

The union officials were therefore not found liable for conspiracy to injure. Two of the judges in the Corbett case did not see that the Crofter case was of any relevance at all. Ford and Lunney JJ.A. both dissented on the ground that the union had acted illegally in removing the names and this was an unjustifiable interference with the employment of the plaintiffs. Ford J.A. also indicated there might be possible breaches of the provincial labour relations statute relating to collective bargaining procedures.

The Crofter case has been followed in other provinces[45] and although there have been subsequent cases where conspiracy to injure appears to have been made a basis of liability,[46] the simple tort of conspiracy is now used far less frequently in Canada. However judges continue to use the expression "conspiracy to injure" even when referring to cases of conspiracy to use unlawful means. Caution must therefore be exercised in categorizing the Canadian conspiracy cases according to conspiracy to injure or conspiracy to use unlawful means. The demise of the use of the tort of conspiracy to injure, in form if not in name, roughly corresponds with the development of provincial labour relations statutes and the more increased use of conspiracy to use unlawful means.

For a plaintiff to succeed in a civil suit there has to be some damage suffered. If a tort such as inducing breach of contract has not yet been executed there is no damage. Hence the necessity to bring an action for conspiracy to use unlawful means where the unlawful means will be an act such as inducing breach of contract or intimidation. In many cases however where conspiracy was alleged the tortious act was being committed so that the allegation of conspiracy was really superfluous. For example in Vulcan Iron Works v. Winnipeg Lodge[47] picketing by machinists and blacksmiths who wanted to unionize their place of employment was deemed to be contrary to the watching and besetting provisions of the Criminal Code.[48] This unlawful act was held to be the unlawful means of the conspiracy. However, the watching and besetting was actually taking place so that the allegation of conspiracy was superfluous.

The labour relations statutes adopted by the Federal Government and the provinces provided detailed guidelines as to when industrial action could be taken legally.[49] It was a short step for the courts to find that breach of statutory guidelines supplied the unlawful means necessary for an action in tort. The origin of the method of founding tortious liability on breach of a statute can be found in cases where conspiracy was alleged.

Early cases in the twentieth century discussed the possibility of founding liability in tort on breach of a statute. In Williams v. United Mine Workers of American[50] union members threatened to strike in breach of the procedures in the 1907 Act if non-union members were not dismissed. The action was brought by coal miners who were forced to quit work because of the action taken by the union. The trial judge, Simmons J., does not deal with the issue of breach of statute. The Appellate Division of the Alberta Supreme Court discussed the proposition that breach of the statutory provisions constituted unlawful means. The four judges were split equally as to whether the union was liable or not. There was also discussion in the case concerning the capacity of the union and the individual defendants to defend the action.

Harvey C.J. stated that he was not convinced that the circumstances of the case did not bring it within the principles of *Quinn* v. *Leatham*.[51] However as already indicated, *Quinn* v. *Leatham* was a case of simple conspiracy; whereas in the *Williams* case unlawful means were being alleged. This is another example of some confusion between conspiracy to injure and conspiracy to use unlawful means.

Having decided that since the union had defended at trial, they could not now object to being a party to the action, Harvey C.J. said,[52]

> Without regard to our own special legislation, but having regard to our Industrial Disputes Investigation Act 1907, c.20 which prohibits strikes except under certain conditions, the right of action, in my opinion clearly exists.
>
> If the employer had waited until a strike had actually taken place and then dismissed the plaintiffs, the defendants would by unlawful means have accomplished their purpose. It seems to me that the threat to do something unlawful to accomplish a purpose is in itself adopting an unlawful means for gaining the object.

The reasoning of Harvey C.J. was followed by Beck J.

However, could a threat to strike really be unlawful according to the guidelines set out in the 1907 Act? Just because the defendants threatened to strike, it did not necessarily mean that if they did strike they would do so in violation of the procedures set out in the Act. It may have been highly likely that they would have done, but that is still not enough to extend the prohibition contained in the Act to threats. The fact that the union had not actually struck was exactly the point made by Stuart J. who found that the union was not liable. He stated that if the union had struck in breach of the Act, this would have been a penal offence and does not go as far as saying that the breach would have supported a civil action. He could find no evidence of conspiracy and dismissed the appeal. As did Hyndman J. who found the case to be on all fours with Allen v. Flood[53] in that there was no malice involved. He dismissed any relevance of the 1907 Act.[54]

> I cannot see what possible bearing the Industrial Disputes Investigation Act, 1907, ch. 20 can have in the case. The consequences to the employer would be the same as though such a statute did not exist and the defendants themselves are the only persons who would incur any extra liability or disadvantages, inasmuch as if they had struck they might be prosecuted and found guilty of a criminal offence, but it seems to me that 'threatening to strike' is not a criminal offence.

The case was appealed to the Supreme Court of Canada[55] which decided the case on the basis of whether the union or individual defendants could be parties to the action. Iddington J. and Mignault J. held that the union was liable for conspiracy to injure. Anglin J., Duff J. and Brodeur J. held that the action could succeed against individual defendants only. Breach of the 1907 Act was considered in passing. Iddington J. suggested that the conduct of the union was also illegal as being in breach of the 1907 Act. Duff J. took the opposite view.[56]

> As to the special legislation, the Industrial Disputes Act, the object of the statute is to interpose investigation and negotiation with a view to conciliation between the institution of a dispute and the culmination of it in a strike or lockout. But there is nothing illegal (notwithstanding the legislation) in an employer or his workmen deciding to pay no attention to outside advice or decision but to insist upon their or his terms and to enforce them by all legal means and nothing illegal in making this known to the other party to the dispute.

The Williams case does not therefore decide the issue of whether liability could be based on breach of a labour relations statute. The Court of Appeal was split evenly on the issue and obiter comments only were made in the Supreme Court.

The facts of the Williams case are very similar to the British case of Rookes v. Barnard[57] which was not heard until 1964. In the Rookes case the tort of intimidation was born to deal with the situation of a threat to strike. In the Williams case Anglin J. in the Supreme Court quite clearly found that the threat made by the local union was unlawful without creating a new action in tort.[58]

> Injury to the plaintiffs has been proved. That injury was the direct and intended outcome of action of the local Union's committee taken by its direction for that purpose. That action amounted to a coercive threat and was therefore an unlawful means taken to interfere with the plaintiffs' employment, the use of which, damage having evolved, constituted in itself an actionable wrong.

As indicated above the action in the Williams case alleged conspiracy on the part of the union. The result of the case was that the defendants were actually found to be liable for threatening to do something even when they may have gone on strike lawfully. In 1918 this represented a considerable extension of the law of conspiracy. This aspect of the case does not appear to have been commented on extensively, perhaps because liability based on breach of a labour relations statute became so much more important.

It was not until shortly after World War II when emergency labour legislation was still in force that breach of that legislation was made exclusively the basis of a tortious action. The legislation was P.C. 1003. As discussed above, up until 1948 there had been suggestions in various cases in Canada[59] that breach of a labour relations statute could supply the unlawful means necessary to establish an economic tort. Always, however, liability had been founded on some other ground. In 1948 the British Columbia Supreme Court held in *Southam Co.* v. *Gouthro*[60] that a strike in contravention of the provisions of P.C. 1003 could supply the unlawful means necessary to found an action in conspiracy. Wilson J. derived much of his inspiration from the *Crofter* case, particularly concentrating on a statement by Lord Wright that conspiracy to conduct a strike prohibited by contemporary English statutes would create a right of action.[61] Wilson J. therefore founded liability based on P.C. 1003 on an obiter remark by Lord Wright which had not been followed by English courts. Wilson J. completely excluded justification as a defence, even though he found the union was acting to further its own interests. Even though the idea of founding liability on breach of a labour relations statute was not new, the principle was not to be used extensively in Canadian courts for another decade.

In 1960 in International Brotherhood of Teamsters v. Therein[62] the Supreme Court of Canada held that a union was liable for interfering with business where it threatened to strike without first using the grievance procedure in the collective agreement as stipulated by statute. Threatening to strike in this way was the use of illegal means. Just one year later the Supreme Court carried the principle further in Gagnon v. Foundation Maritime.[63] The case was an appeal from New Brunswick and involved the conduct of a union in mounting a picket line outside the plaintiff company's premises on a construction site to achieve recognition. Employees of the company refused to cross the picket line and work stopped. The majority of the Supreme Court held that the picket line induced an illegal strike of the employees contrary to the provisions of the labour relations statute. This illegal strike supplied the illegal means necessary to find the union liable for conspiracy.[64]

> ...when inquiry is "made of the statute law" in the present, it discloses, as has been said, that means here employed by the appellants were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy...

Of interest is the dissenting judgment of Judson J. in which he points out that at common law the strike and the picketing would be quite lawful after the Crofter case.[65]

> This judgment makes a strike, which was formerly not actionable, actionable in conspiracy, solely on the ground of violation of the Labour Relations Act, when there is no conduct on the part of the participants which can be labelled as criminal or tortious.

Judson J. goes on to state what would be necessary in his view to support the finding of the majority.[66]

> If there is to be liability in damages for the tort of conspiracy founded solely upon a breach of the Labour Relations Act, it should, in my respectful opinion, be imposed by the legislature and not by what I regard as an unwarranted extension of the case law.

Unwarranted or not the common law had nevertheless been extended to create what one commentator has called[67] "a new kind of actionable conspiracy". In fact the principle of founding illegal means on breach of a labour relations statute was not confined to conspiracy alone as Therein had already shown.

(b) Inducing Breach of Contract

The Canadian courts adopted the tort of inducing breach of contract as enunciated by the British courts in Lumley v. Gye.[68] In Brauch v. Roth[69] the defendant union official was held to have induced breaches of the plaintiff's employees' employment contracts by persuading them to strike. Teetzel J. held that no malice had to be proved and that[70] "If the breach of the contract of service by the workmen was an unlawful act, anyone who induces and procures the workman, without just cause or excuse to break such contract also acts unlawfully, and thus the allegation that the act was done unlawfully is established."

Teetzel J. did not consider any possible defence of justification or legitimate self-interest. The attitude of Canadian courts has varied in the past in relation to the concept of justification. On the one hand judges gave full recognition to the defence. This can be illustrated by a case considered by the Supreme Court of Canada in 1950.

In Newell v. Barker and Bruce[71] a union advised a main contractor that it would not supply union men to work with non-union men employed by a subcontractor. The plaintiff subcontractor failed to ensure that he and his men joined the union and he lost his contract, whereupon he sued the union for conspiracy to interfere with his contractual relations. The Supreme Court unanimously held that the union had acted within its rights in advising the main contractor and there was no evidence of a conspiracy to injure or that the union had induced the breach of contract. Rand J., contrary to the practice of previous Canadian judges, gave full recognition to a defence of justification as expounded in the Crofter case[72] in relation to conspiracy.

> It is now established beyond controversy that in the competition between workmen and employers and between groups of workmen, concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct.

Rand J. qualified his statement in accordance with the Crofter case by agreeing that conduct with the purpose of injuring a competitor would not be justified. Such an evaluation of the purposes of union conduct by judges is subjective and can just as easily lead them to the conclusion that malice is involved on the part of the union. After the Newell case it seems that many judges chose to view union conduct in that light. In the Newell case Rand J. related the defence of justification to inducing breach of contract by finding that the union had only refused to authorize union men to work. He found that the labour market was competitive and the actions of the union were merely in accordance with accepted practice.

In the Alberta case of Bennet and White Alberta Ltd. v. Van Reeder[73] a picket line was placed at the entrance to a job site to pressure a subcontractor into signing a collective agreement, even though the subcontractor's employees had voted not to join the union. The picket line caused employees of the main contractor not to turn up for work as they would not cross the picket line. The contractor therefore applied for an injunction against the picketing. There was no evidence that the picketing was anything other than peaceful. The union appealed against the imposition of an injunction. In the Alberta Supreme Court Clinton Ford J.A. dealt with the defence of justification thus.[74]

> It cannot be held on the facts otherwise than that the appellants formed the picket line for the immediate if not the predominant purpose of procuring the breach of contract. It may be accepted that they also had in mind to advance, thereby the interests of their Trade Union, but this is not legal justification for committing a tortious act that in itself created common law liability.

In the Ontario case of Smith Brothers Construction v. Jones[75] workers were picketing to persuade their employer to enter into a collective agreement with them. There was no evidence that the picketing was anything other than peaceful but some workers had refused to cross the picket line. McLennan J. held that there was no justification for the union's conduct in picketing because the union could have obtained recognition by going through the proper procedure under the provincial labour relations statute. He found the defendants liable for inducing breach of contract.[76]

> However, in my opinion if the development of the Trade Union movement has reached the point where workers will not cross a picket line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be. Loyalty to the rule that I have mentioned having been developed, the rule should not be abused for a wrongful purpose and where there is no justification.

Justification was considered in the Ontario case of Posluns v. Toronto Stock Exchange.[77] The case did not involve a labour dispute but a third party allegedly inducing a breach of an employment contract. Gale J. considered the occasions when justification could be used as a defence. He found three. They were where when interference with contract was promoted by an impersonal or disinterested motive, in the public interest or through the exercise of a statutory or contractual interest. These defences have subsequently been referred to in some labour dispute cases,[78] but involve problems of their own in application. For example the question of what would constitute "the public interest" in a labour dispute would be impossible to predict.

The cases discussed above illustrate how vulnerable a picket line is in Alberta to a charge of inducing breach of contract. There is no equivalent to section 3 of the British Trade Disputes Act 1906 which protects against liability for inducing breach of employment contracts. Judges made frequent reference to the picket line rule whereby workers would not cross picket lines. In the Alberta case of North Fork Timber Co. Ltd. v. Mackenzie.[79] Employees of a sawmill were on a legal strike and picketed the entrance to a second sawmill owned by their employers. The employees at the second sawmill were not members of the union, but there was evidence that some of them would not cross the picket line. The case was actually one of secondary picketing although that phrase is not referred to in the judgment.

The picketing was found to be unlawful because it was inducing employees to break their contracts of employment. The intention of the union was found to be to better its position in the dispute with the employers. Such an intention (which on another view could just as easily be labelled legitimate self interest) afforded no justification for inducing breach of employment contracts.

Although the defence of justification has been considered more fully in Canada, the tort of inducing breach of contract has not developed into such a sophisticated form as it has in England. Canadian cases have referred to the British case of D.C. Thompson and Co. v. Deakin[80] where direct and indirect breach of contract were distinguished as two separate forms of action. In picketing cases the inducement would normally be classified as direct, but this is not often made clear in Canadian cases.[81] There is little detailed analysis of the components of the tort as there are in British cases. There are several reasons for this. With no equivalent of the Trade Disputes Act 1906 there are no statutory provisions which require a detailed study of the tort to see when immunities from liability may or may not apply. Conspiracy was also used more often as a basis of liability in Canada.

Further, as was shown in the preceding section liability based on a breach of the labour relations statute was increasingly more important in Canada. As the Gagnon[82] case showed, liability could also be founded on inducing breach of contract with breach of the labour statute supplying the necessary unlawful means for the tort. It will also be seen when discussing the provisions of the Alberta Labour Relations Act that secondary boycotting was illegal in any event. There was therefore no need to discuss or develop the tort of inducing breach of contract in that context.

(c) Intimidation

The criminal offence of intimidation is contained in what is now section 381 of the Criminal Code.[83] Section 381(b) provides that anyone is guilty of an offence who wrongfully and without lawful authority, with a view to compel another to abstain from doing anything from which he has a lawful right to abstain

> (b) intimidates or attempts to intimidate such other person or the wife, child, parent or other relation of such other person by threats that, in Canada or elsewhere, violence or other injury will be done to, or punishment inflicted upon him, her, or any of them or that the property of any of them will be damaged.

The tort of intimidation in Canada has generally followed the definition in the criminal statute. There has been no refinement of the tort as there was in the British case of Rookes v. Barnard.[84] It will be remembered that in that case a threat by the union made to an employer gave a cause of action in intimidation to the employee who suffered damage as a result of the threat. In Canada intimidation is more often associated with threats made on a picket line to strike breakers.

In King Furniture Co. v. Union of Wood Workers[85] a union was on strike as a result of grievances with the employer. It was held that the defendants had a lawful right to strike. The action brought by the employer was for inducing breach of other workmen's employment contracts by picketing the factory premises. Meredith J. held that the pickets were guilty of the crime of watching and besetting. With regard to tortious liability he stated as follows.[86]

> The conduct of those who beset and watched the factory was often of an offensive and highly reprehensible character: the plaintiffs' workmen were insulted, obnoxious expressions and offensive noises were directed against them, and they were sometimes crowded off the sidewalk - conduct calculated to cause a breach of peace by those who had the courage to resent it, and to intimidate and force from their employment those who had not;

In conclusion Meredith J. found that[87] "The defendants must be held to really intend that which is the plain effect of their actions - the injury of the plaintiffs by intimidation". The language used by Meredith J. is very similar to that used by Scott J. in the British case of Thomas v. N.U.M.[88] Conduct that Meredith J. calls intimidation, Scott J. later defined as harassment. A fundamental difference between the two cases however, was that in Thomas v. NUM the action was brought by the working miners who were actually suffering damage. In King Furniture Co. the action was brought by the employer. The employer was able to maintain the action even though the threats were made to his employees and his customers and not to him directly.

In Army and Navy Department Store (Western) Ltd. v. Retail Wholesale and Department Store Union[89] an employer issued contempt proceedings when a union did not obey the terms of an injunction. The employer alleged that the pickets were exceeding their rights under the British Columbia Trade Unions Act. Farris C.J.S.C. held that the conduct of the mass pickets went beyond communicating information. With regard to the conduct of the pickets he said as follows,[90]

> Words do not have to be spoken, threats do not have to be made to constitute intimidation. The mere fact that a member of the public might have to pass through a lane of pickets, even although such pickets speak no words or make no unfriendly gestures might, in itself, be an effective form of intimidation.

Once again comparisons can be made with Scott J.'s finding in the 1980s case of Thomas v. N.U.M.[91] that such conduct constituted harassment. It is difficult to see how in the Army and Navy case the conduct of the pickets constituted intimidation of the employer so as to give him a cause of action.

Mass pickets have also been held to be intimidatory in Canada on the basis of numbers alone. In Vulcan Iron Works v. Winnipeg Lodge[92] Mathers J. found that several workmen would coerce rather than persuade a workman not to cross a picket line. The workman would then have no choice but not to cross the picket line and this would constitute intimidation. In 1970 the Alberta Supreme Court considered an appeal against the granting of an injunction in Alberta Wheat Pool and Federal Grain Ltd. v. Butler.[93] The slightly unusual facts involved officers and members of the National Farmers Union who were picketing elevators and other places used by the plaintiff producers of fescue. The purpose was to persuade the plaintiffs to pay increased prices to them. The union was not recognized by the plaintiffs as a bargaining agent, as the farmers were not technically employed by the plaintiffs. The case therefore fell outside the provisions of the Labour Act. Riley J. nevertheless applied principles enunciated in trade dispute cases and found that the information picketing constituted intimidation or interference with the business of the plaintiff. There was no possible defence of justification as the aims of the union went beyond self-interest.

There was some evidence that violence had occurred on the picket line and this was obviously a ground upon which to make a finding of intimidation. However Riley J. went on to make some comments related to the nature of the National Farmers Union. By this time in Alberta, legislation existed for the certification of ~~trade~~ unions when they were recognized by employers. Riley J. pointed out that the National Farmers Union was not certified.[94]

> It has not processed a proper strike action under the legislation of either the federal or provincial governments. It has no trade-union rights to protect. Its activities cannot be termed "legitimate" union activity. Its conduct is intimidation.

The above statement is strange bearing in mind the facts of the case. The N.F.U. was in the position of a lobbying organization. None of its members were employed by the plaintiffs so that certification of the union was not even possible. The judgment calls into question the status of any demonstrators in Alberta in a non trade dispute situation.

It can therefore be seen that intimidation as a tort in Canada is generally defined in terms of threats made on a picket line. Since the advent of provincial labour relations statutes a threat to strike would constitute a threatened breach of the labour relations statute as occurred in International Brotherhood of Teamsters v. Therein.[95] There has, as a result been no need for the further development of the tort of intimidation as occurred in Rookes v. Barnard.[96] There was a hint of Rookes v. Barnard in the earlier Alberta case of Williams v. United Mine Workers of America[97] which was discussed in relation to conspiracy. The line of reasoning did not develop any further as it was overtaken by liability based on breach of a labour relations statute.

(d) Trespass

The law of trespass in Canada has had particular impact on the law of picketing in relation to picketing in shopping centres where common walkways are in private ownership. In Zellers (Western) Ltd. v. Retail Food and Drug Clerks' Union[98] the British Columbia Court of Appeal held that peaceful picketing did not violate easement rights of the plaintiff. In Grosvenor Park Shopping Centre Ltd. v. Waloshin[99] the Saskatchewan Court of Appeal held that a lessor had issued an open invitation to the public to come on to his premises so that he no longer had exclusive possession. It was held that he could not therefore maintain an action in trespass against pickets.

The issue came before the Supreme Court of Canada in 1976 in the case of Harrison v. Carswell.[100] The defendant employee of a tenant in a shopping centre was engaged in a lawful strike. In pursuance of the strike she peacefully picketed outside the tenant's premises which were inside the shopping centre. The owner of the shopping centre protested and requested the picket to move. The defendant did not move and was subsequently arrested and charged under the Manitoba Petty Trespass Act.[101] The resulting convictions were set aside by the Manitoba Court of Appeal[102] and the plaintiff owner appealed to the Supreme Court.

More than any other picketing case which had come before the Supreme Court Harrison v. Carswell required a decision based on policy considerations rather than a strict application of the law. The conflicting laws were relatively clear; under Manitoba labour legislation those lawfully on strike had the right to picket peacefully at their employer's premises and under common law an owner of property had the right to enjoy it free of trespass. The latter statement could arguably be qualified in the case of a shopping centre owner who has extended an invitation to the public to use his premises. The majority opinion of the court however, as expressed by Dickson J., refused to deal with the case by way of overt policy considerations. The decision however is undoubtedly based on policy reasons as is evidenced by the following statement of Dickson J.[103]

> The submission that this court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs.

This statement is perfectly true but by purporting not to decide the issue on a policy basis in this fashion, Dickson J. is doing exactly the opposite. He gives little consideration at all to the right to picket peacefully and upholds the rights of the plaintiff owner on the basis that[104]

> Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.

The majority decision relies to a great extent on a previous decision of the Supreme Court in R v. Peters.[105] However, as was pointed out in the dissent by Laskin C.J., the ruling in that case had consisted in a brief answer to a specific question. The question was whether an owner of a shopping centre had sufficient possession of his property to maintain an action for trespass. The whole court had unanimously held that he did, but this was completely different to considering a conflicting law in relation to the law of trespass.

At the very least the majority opinion of the Court should have discussed the two rights in full to see at what point they came into conflict and, in the absence of legislative direction to see if they could co-exist. This approach is the one taken by Laskin C.J. in his dissenting judgment. The Chief Justice recognized the rights that were in conflict.[106]

> It seems to me that the present case involved a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation.

Laskin C.J. went on to consider the nature of trespass and found that the same principles cannot apply to private residences and shopping centres. This was true particularly where the owner has extended to the public a general invitation to use his property. The Chief Justice pointed out that the picketing involved no challenge to the owner's title or to his privacy and balanced the conflicting rights thus,[107]

> I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of the members of the public, doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based.

In balancing these rights, Laskin C.J. is not saying that the owner has no property rights, but rather in this situation they have been modified and the rights can co-exist with certain other lawful rights. In one respect the Chief Justice is fairly extreme in the rights he accorded to the public visiting the shopping centre. Unless their activities are unlawful he stated that the owner can only withdraw his invitation if the public misbehaves. It may be that the Chief Justice considered that he had gone too far in making new inroads in the law of trespass as he later stated that[108]

> ...it does not follow that because unrestricted access is given to members of the public to certain areas of the shopping centre during business hours, those areas are available at all times during those hours and in all circumstances to any kind of peaceful activity by members of the public, regardless of the interest being promoted by that activity and regardless of the number of members of the public who are involved.

The judgement of the Chief Justice and the reasoning therein acknowledges the duty of the Court to make a policy decision given the conflict of the laws of picketing and trespass and endeavours to do so in a fair way to both parties. By contrast the majority judgment professes not to be making a policy decision when it is in fact upholding the right of the property owner without considering the impact of other laws. The approach of the Chief Justice is preferred, but unfortunately for those desiring to picket peacefully in shopping centres, their rights must give way to the rights of the owner, with whom they are not even in dispute.

The Alberta Petty Trespass Act[109] is in similar terms to the statute considered in Harrison v. Carswell so that the law in Alberta is as set in the judgment of Dickson J.

(e) Residual Forms of Liability

Other forms of tortious liability have appeared in Canada which have developed from the torts discussed above. The alternative tort most often mentioned is interference with business or interference with contractual relations short of actual breach of contract.

Secondary picketing had been declared to be unlawful per se in Ontario by the Court of Appeal of that province. In Hersees Ltd. v. Goldstein[110] a union picketed a shop selling goods from a manufacturer with whom the union was in dispute. The picketing was enjoined because it interfered with the plaintiff shopkeeper's relations with the manufacturer. As well as taking judicial notice that union members would not cross picket lines, Aylesworth J. also took notice that many members of the public would also not cross the picket line.

The Supreme Court of Canada is one of the few Canadian courts that has properly considered the issue of causation in relation to inducing breach of contract. In Newell v. Barker and Bruce[111] the plaintiff subcontractor lost his contract from the main contractor. The subcontractor had employed non union men in breach of an agreement between the union and the main contractor. The union reported the fact to the main contractor that union men would not work with the subcontractors' employees and no more union labour would be supplied. The subcontractor sued the union for conspiracy to interfere with his contractual relations.

The Supreme Court attributed the cause of the breach of the subcontractor's contract to the choice made by the main contractor based on the facts before him, rather than to the threat by the union. In picket line cases however the chain of causation is easier to follow and Canadian judges have not spent a lot of time considering causation.

The tort of nuisance will be considered in relation to the watching and besetting provisions of the Criminal Code. It remains now to examine the evolution of labour relations statutes in Alberta.

(2) The Evolution of Compulsory Collective Bargaining Legislation

(a) Labour Law Divided Between the Provinces and the Dominion Government

It has been noted above that the Industrial Disputes Act 1907 was not popular. The Act was also the subject of some controversy concerning the constitutional competency of the Dominion Parliament to legislate it. The issue centered on the powers given to the provinces under section 92 of the British North America Act 1867.[112] It was argued that jurisdiction over the civil rights of employers and employees was thereby given exclusively to the provinces. Two earlier challenges to the Act had occurred and failed, firstly in 1912 by the employees of the Montreal Street Railway and then in 1917 by employees of the Edmonton Street Railway.[113] The challenges consisted of opposing the appointment of a board of conciliation. The controversy spilled over into the period at the end of the First World War when there was also much industrial unrest due to the return of many soldiers to the workforce and high living costs. Some of this unrest culminated in the Winnipeg General Strike in 1919.

The constitutional issue finally came to a head in 1925 and a new era of Canadian labour history was begun. A case involving a dispute of street railway employees in Toronto was appealed to the Judicial Committee of the Privy Council. It involved an attempt to appoint a board of conciliation. The decision of their lordships in Toronto Electric Commissioners v. Snider[114] was to the effect that this procedure, and in fact all aspects of the 1907 Act were unconstitutional insofar as they related to matters within the exclusive jurisdiction of the provinces. Such jurisdiction included the civil rights of employers and employees.

From 1925 then up until the present day the provinces have had jurisdiction to make laws relating to employment within the provinces. The Federal Parliament retained jurisdiction over its own employees and after the Snider case the 1907 Act was amended[115] to apply to "employment upon or in connection with any work, undertaking or business which is within the legislative authority of the Parliament of Canada". The federal act still only applied in certain industries - mining, transportation, communication or a public service utility. Henceforth the act would also only apply to employment relationships arising in circumstances over which the Federal government had exclusive jurisdiction.[116] The amending Federal Act also provided that the provinces could pass enabling legislation to make the act applicable in their own jurisdictions.

The Alberta legislature passed the Labour Disputes Act[117] in 1926. In two aspects it differed from the federal legislation. First it applied to employers of ten or more employees[118], thus widening the scope from public utilities. Secondly, there was no prohibition on strikes or lockouts pending the report from a conciliation board, recourse to which was made voluntary. In 1928, taking up the invitation of the amended federal legislation, the Industrial Disputes Investigation Act (Alberta)[119] was passed. This Act applied the provisions of the Federal Act to every dispute defined by the Federal Act, even though the dispute was within the exclusive jurisdiction of the province. The Alberta statute of 1928 therefore only applied to mines and public utilities, so that other disputes were still under the jurisdiction of the Labour Disputes Act 1926.

(b) The American Influence on Canadian Labour Law

This chapter thus far has concentrated on the British influences on Canadian labour law which were important during the end of the nineteenth century and the beginning of the twentieth. However, there were also, during this time, influences from south of the Canadian border which were to become more pronounced, during and after World War II.

One reason that the American influence was to become more pronounced was the great influence of American unions in Canada. The development of international unions contributed to the decentralization of Canadian labour. Many Canadian unions were affiliated to the American Federation of Labour.[120] Although not all conquests of Canadian workers were accomplished without incident,[121] by the beginning of the twentieth century the American unions dominated organizations of Canadian labour. The fact that American businesses were expanding into Canada also facilitated the spread of American unions.

Legislation in the United States which regulated the affairs and activities of trade unions was very different from the British legislation. In the Erdman Act,[122] enacted in 1898 and limited in its scope to railways, the emphasis was on intervening in the process of collective bargaining to effect agreements. The British statutes of this time did not impinge on the collective bargaining arena. The tradition of interventionist legislation survived the Erdman Act, culminating in the enactment of the Wagner Act[123] in 1935. The Act introduced new concepts amongst which were unfair labour practices, certification for a majority of employees as a bargaining unit and a duty on the employer to bargain with that unit. The National Labour Relations Board was empowered to issue a cease and desist order against illegal strikes.

To some extent the Canadian legislation had adopted the interventionist approach in enacting the provisions of the Industrial Disputes and Investigation Act 1907. This was a natural development given the fact that socially and economically Canada and the United States had much in common. As was shown above, the 1907 Act was not often used in Canada, perhaps because it did not go far enough. If intervention is to be the formula in dealing with labour relations, then half measures, at least at this stage in history, were not enough. The provisions of the

1907 Act had nevertheless been adopted by the provinces since the Snider decision.

Following the enactment of the Wagner Act in the United States in 1935, the Canadian Trades and Labour Congress prepared a precedent statute based on the American Act to be adopted by the provinces. In Alberta, the first Social Credit government in the world had been elected in 1935 under Premier Aberhart. A local historian has said:[124]

> It is, perhaps one of the intriguing paradoxes of Canadian history that the rising militancy and radicalism generated by the collapse of the capitalist economy during the thirties gave rise to one of the most conservative political elements in the country - Social Credit.

Initially, the new government was not outwardly conservative as far as labour interests were concerned. Having been elected to power on a wave of support from farmers and labour alike, the government consolidated its labour support by adopting the draft statute prepared by the Trade and Labour Congress. The result was the Freedom of Trade Union Association Act[125] of 1937 which legalized trade unions and gave them the right of collective bargaining. The Act also prohibited employers from preventing employees from exercising their rights under the Act.

In 1938 the Alberta legislature passed their first comprehensive labour statute; the Industrial Conciliation and Arbitration Act.[126] The 1938 statute reiterated the provisions of the 1937 Act, but went further in incorporating a delay period of fourteen days before a union could legally strike and provided for voluntary submission to conciliation.

During World War II, the Federal Government resumed jurisdiction over all industries associated with the war effort. A series of measures were passed,[127] the most important of which was P.C. 1003 in 1944 which embodied the distinctive features of Canadian statutes and American law as stated in the Wagner Act The right to strike was only given after compulsory conciliation procedures had been completed and there were no provisions dealing with the conduct of strikers and pickets. It may perhaps have been hoped that the machinery of the Act would be so effective that there would be no need for such conduct. This was not to be however, as organized labour had little compunction at all in taking part in strikes contrary to the provisions of the legislation.

At the end of the war the authority of the Dominion Government under P.C. 1003 came to an end and in the federal jurisdiction the Industrial Relations and Disputes Investigation Act 1948[128] took its place. In Alberta the 1938 Industrial Conciliation and Arbitration Act had to a great extent been repeated in the first series of revised Alberta statutes in 1942.[129] Then came the federal jurisdiction of P.C. 1003. After the war in 1947 the Alberta Labour Act[130] was passed which repealed all former provisions. It was a comprehensive statute, the bulk of which dealt with working conditions. Part five dealt with 'conciliation and arbitration' and the ability of trade unions to take industrial action was circumscribed much as it had been in previous legislation. The new Labour Act also created a Board of Industrial Relations[131] which had the power to hear cases relating to disputes between employers and employees over hours, wages and terms and conditions of employment. A settlement, adjustment or compromise made by the Board was binding on the parties.

In 1947 in Alberta the legal status of trade unions was not clear. The Freedom of Trade Union Association Act had been repealed in 1938.[132] A new section proclaiming that trade unions were legal entities for the purposes of criminal prosecution and tortious liability was not to be enacted until 1970.[133] The technical point does not appear to have hindered the prosecution and suing of trade unions in the intervening period. Officers of the trade union could be named as defendants[134] or the courts would follow the reasoning of the Taff Vale[135] case from Britain and hold that the Labour Act implicitly recognized trade unions as legal entities.[136] The latter point was upheld by the Supreme Court of Canada in International Brotherhood of Teamsters v. Therein.[137]

By 1947 unions in Alberta had the right to bargain collectively and employers were prohibited from interfering with this right. Unions had the right to enter into collective agreements although the agreements were not made binding on employer and employee until 1948[138]. Conciliation and arbitration were voluntary, but strikes were prohibited during certain time periods of the process. Any strike was prohibited until a majority of employees had voted in favour of a strike in a vote supervised by the newly created Board of Industrial Relations.

The American legislation had thus considerably influenced federal and provincial statutes in Canada so that the latter were completely different from those in Britain. The Canadian legislation concentrated on the relationship of employer and employee before and during a dispute, while leaving to the courts a free hand in applying the law in the event of a strike. The British legislation, up until the 1970s, relied on the tradition of voluntary collective bargaining to regulate conduct between employer and employee, but provided more detailed guidelines for the courts to follow in dealing with industrial disputes.

(c) The Further Development of Alberta Legislation

Until 1960 the Alberta legislation did not even include any provisions to deal with the conduct of strikers and pickets. Beginning with several amendments in 1960, this was to change. There could be a number of reasons for the change in policy. By 1960 the Social Credit government had moved from its pro-labour stance to one of conservatism.[139] The more conservative attitude is reflected in the nature of the new statutory provisions which greatly restricted the activities strikers could engage in. Further the existing legislation had not ensured that workers never went on strike.[140] The next logical step was to legislate for that eventuality.

In 1960 section 13 of the Alberta Labour Act[141] was passed to ensure that picketing did not force employees to agree to be represented by a union or force an employer to agree to a collective agreement.

> s.13 A trade union shall not be certified as a bargaining agent if, in the opinion of the Board, application for membership or

> membership in the trade union directly resulted from picketing of the place of business of the employer at which the employees affected are employed, or elsewhere.
>
> s.14 Where an agreement is negotiated between an employer and a trade union as a result of the employer's recognition of the trade union as a bargaining agent, if the recognition directly resulted from picketing of the place of business of the employer at which the employees affected are employed, or elsewhere, the agreement shall be deemed not to be a collective agreement for the purposes of this part.

These sections considerably cut down the extent to which trade unions could campaign for support or recognition without fear of being challenged at a later date. Picketing of the type that occurred in Bennett and White Alberta Ltd. v. Van Reeder[142] would henceforth be completely unproductive aside from any consideration of the torts of conspiracy or inducing breach of contract.[143]

A further amendment declared that a strike was illegal when the provisions regarding voluntary conciliation and arbitration were in progress or until fourteen days after a strike vote had been taken. Section 31(2) of the 1960 Act provided that

> Where a strike is illegal no trade union or member of the trade union or other person shall dissuade or endeavour to dissuade anyone from
> (a) entering an employer's place of business, operations or employment,
> (b) dealing in or handling the products of any person or
> (c) doing business with any person.

This section did not mention the word 'picketing' but the terms of the section specifically describe the action of picketing. It is a negative section in that it does not describe or define activity that is permissible, only that which is prohibited.

In 1968 a further amendment to the Labour Act[144] provided that it was unlawful to strike during the life of a collective agreement. If it was unlawful to strike it was also unlawful to picket. As a result of the legislation the circumstances in which an employee could strike or picket legally were minimal.

In the period just prior to 1968, there was much unrest and protest in Canada generally about the way the system of industrial relations was working and in particular the use of the ex parte injunction.[145] In 1965 the first national postal strike occurred. Pickets were jailed in the course of a strike at the Oshawa Times in Ontario when protesting against an ex parte injunction and violent strikes occurred in the steel industry in Ontario. These are just a few examples of the discontent which led in Ontario to the setting up of the Rand Royal Commission to investigate the concept of the labour dispute. At the same time Prime Minister Pearson set up the Federal Woods Task Force on Labour Relations. Both inquiries reported in 1968,[146] the same year as the Donovan Report[147] in Britain. In marked contrast to the Donovan Report, both Canadian reports dealt extensively with the issue of picketing, demonstrating how much more serious the issue was in Canada.

The report from Ontario went much further than the federal report in terms of its recommendations. The Ontario report recommended that not crossing a picket line should not constitute a breach of a collective agreement or the law.[148] The report further stated that the law should permit ally picketing, that is, picketing at premises to which an employer may have switched production during a dispute or where another employer is doing the first employer's work. It was proposed that consumer picketing to inform the public be permitted, and that the Court or Board should be able to lift the corporate veil to see if a purported separate employer was in fact the primary employer.

More controversial recommendations dealt with the forum for resolution of disputes. The Ontario Commission stated that most aspects of picketing such as the object and consequences (why), the circumstances of collective bargaining in which the picketing occurred (when), and the location of the picketing (where) should be dealt with by a labour relations board exclusively. However the form of the picketing (how) would remain within the jurisdiction of the courts. This would, in effect, preserve the common law torts and the inadequacies of the injunction process. Not surprisingly, this recommendation was criticized[149] as not going far enough.

In contrast, the Federal Task Force recommended picketing be permitted only at the employer's place of business operations, and secondary picketing should only be permitted in narrow circumstances. Where the picketing occurred at multi-union sites it was to be restricted to the union in dispute only. The Task Force did, however, recommend that the issuance of injunctions be placed within the jurisdiction of a labour tribunal if the constitutional problem of giving a tribunal such jurisdiction could be solved.

(d) The Alberta Labour Act.1970

When the Alberta Labour Act was revised in 1970[150] the provisions enacted did not go as far as either the federal report or the Ontario report. Before looking at the substantive changes to the statutory provisions concerning picketing and strikes, it is important to note exactly who the relevant statutory provisions applied to. The Labour Act of 1970 stated expressly that it did not cover domestic servants in a private house, farm laborers and municipal policemen.[151] Policemen and firefighters were included in a separate statute; An Act Respecting Labour Relations for Policemen and Firefighters.[152] Section 4 of the Policemen and Firefighters Act prohibited these two groups of employees from taking part in a work stoppage to force their employers to accept terms and conditions of employment. A system of compulsory arbitration provided for the resolution of disputes.

Since 1906,[153] employees working in the public sector in Alberta had been governed by separate statutes which dealt with negotiating procedures in the event of a dispute. In 1977 these procedures were considerably overhauled and changed by the Public Service Employee Relations Act (P.S.E.R.A.).[154] This Act brought labour relations in the public service into line with the administration of labour relations in other areas of employment. For example, a Public Service Employee Relations Board similar to the Labour Relations Board, was set up to hear applications and unfair labour practices were defined. However there was one very significant difference. Section 93 of P.S.E.R.A. provided;

> (1) No person shall cause or attempt to cause a strike by the persons to whom this Act applies,
> (2) No person to whom this Act applies shall strike or consent to a strike.

At one fell swoop a considerable portion of the working population of Alberta were denied the right to strike. In place of the strike was compulsory arbitration. No provisions to deal with picketing were necessary because there would be no strikes. The trend therefore in labour relations legislation was to exclude various groups of employees from the legislation and to refuse to a wider section of the working population the right to strike. As a result of the way the legislation was framed the same groups of employees lost their right to picket. As will be shown in Chapter 4 this trend was to continue when further groups of workers were excluded from the legislation.

In 1970 the statutory provision in the Labour Act relating to picketing was also amended.[155] Instead of merely stating when picketing was prohibited, the new section declared when it was to be allowed.

> s.100(1) When there is a lawful strike or lockout, a trade union, members of which are on strike or locked out, and anyone authorized by the trade union may, at the striking or locked out employees' place of employment and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to
> (a) enter the employer's place of business, operations, or employment, or
> (b) deal in or handle the products of the employer, or
> (c) do business with the employer.

> (2) In respect of matters to which this Part applies, except as provided in subsection (1), no trade union or other person shall persuade or endeavour to persuade anyone not to
> (a) enter an employer's place of business, operations or employment, or
> (b) deal in or handle the products of any person, or
> (c) do business with any person.

By this section picketing was confined to the circumstances of a lawful strike and to the premises of the employer of those on strike. Secondary picketing was thus prohibited. The people who could picket were limited to those trade union members on strike and anyone else authorized by the union. The above were the obvious guidelines laid down in the new statute as to the future conduct of picketing. Less obvious and far more ambiguous was the term "without acts that are otherwise unlawful". Just what acts this phrase included was to be decided by the courts, but at this stage there was already a great amount of jurisprudence for the judges to draw upon. Criminal acts would clearly be acts otherwise unlawful, as would acts of a tortious nature such as defamation, trespass and nuisance.

In fact when considering the range of unlawful acts that are inevitably committed during the course of picketing, the question arises as to when picketing would ever be lawful under section 100. Effective picketing necessarily involves inducing others to break their employment contracts or inducing customers and suppliers to break their commercial contracts. Picketing can easily be defined as intimidatory if workmen are harassed. These are just a few of the many ways in which picketing can be declared to be unlawful even when pickets are merely attending to persuade others not to do the actions outlined in section 100(1). On this view, which is quite consistent with the wording of section 100, there could be no lawful picketing in Alberta.

Far from enhancing the rights of pickets by phrasing the section in a positive form, the section is self-proclaimed to be subordinate to other statutory laws and to common law doctrines. In interpreting section 100 the courts however have not held that there is no right to picket at all. This may be because the argument has never been put to them in that fashion. In a discussion of the cases in the next section it will be seen that the courts have restricted the operation of section 100 by endeavouring to reconcile section 100(2) with section 100(1) in the situation of multi-employer job sites.

Another feature of section 100 is that it only relates to attending at the place of employment for the purposes of persuasion. Attending for the purpose of communicating information is not mentioned. Presumably therefore an information picket could attend anywhere and at any time. Section 381 of the Criminal Code relating to watching and besetting would still be relevant, but provided conduct came within the peaceful picketing proviso it would not be unlawful.[156] However, even an information picket could commit a criminal offence and be deemed to be acting in an otherwise unlawful manner. Also, as the cases will show as soon as information picketing became effective it would be enjoined.

One further change made by the legislation in 1970 was the power given to the Labour Relations Board to issue a cease and desist order in any matter relating to an illegal strike or lockout which was referred to it.[157] However, there were no provisions giving sole jurisdiction to the Board in this area, so that employers could choose to sue in the courts as an alternative. The courts also retained final jurisdiction in that decisions of the Board could be referred to the courts by way of judicial review.

In 1973 a new section was added to the Labour Act which related to secondary action.[158] Section 156 made it an unfair labour practice to refuse to do work for an employer because other work was not performed by union members or to refuse to take delivery of goods from a carrier or assist in loading goods for a carrier, except where the carrier and his employees are engaged in a lawful strike or lockout.

The Alberta Federation of Labour expressed its dissatisfaction with the legislative changes in 1973 when the labour relations legislation was consolidated.[159]

> The patience with which the labour movement has awaited the amendments of the government has been rewarded in claims of a new Alberta Labour Act, but in fact we have simply a new arrangement of an old composition. It is obvious that the vast majority of the Cabinet do not understand the legitimate wishes and desires of working people.

The Federation was concerned at the limited rights unions possessed under the legislation, the extended powers of the Minister of Labour and the Labour Relations Board into collective bargaining procedures and the equality of penalties under the Act as applied to employers and employees.

The Federation argued that employers could far more easily afford $1,000 a day as a penalty for staging an illegal strike or lockout.

(e) Interpretation of the Alberta Labour Act by the courts

In 1973 the case of *Attorney General of Canada* v. *International Union of Elevator Constructors*[160] was considered at first instance. The case involved a lawful strike by employees of the Otis Elevator Co. Ltd. The employees worked at various locations including a post office where elevators were installed and picketed the post office in pursuance of the strike. Bowen J. held that the term employees' place of employment in Section 100 of the Labour Act could include all the various locations at which an employee was directed to perform services by his employer.

Although this ruling is confined to peripatetic workers, it is a significant departure from a complete ban on secondary picketing which section 100 appears to stipulate. The apparent ban on secondary picketing was also relaxed somewhat in the case of *Carnfarge Ltd.* v. *Tunney*.[161] It was held in that case that employees who usually worked outside at various locations could picket their company offices. The case is also authority for the proposition that seasonal workers whose employment was terminated before a strike began, still had the right to picket within the statute if the picket was authorized by the union.

With regard to picketing for the purpose of communicating information only, a decision of the British Columbia Supreme Court is interesting because the relevant statutory section was similar to section 100. The facts of Attorney General of Canada v. Whitelock[162] involved a dispute between the union and the Post Office. Pickets protested outside post office premises at the employment of a non-union express mail company. The pickets carried signs which merely stated that the post office was employing such a company. The postal service was disrupted as a result of the picketing and an application was made for an injunction.

Although the postal service is within the jurisdiction of the Federal Government, Berger J. did not apply federal labour laws because there was not in fact a labour dispute between the Post Office and its employees. He looked at the contemporary section of the British Columbia Trade Union Act[163] which was in much the same terms as section 100 of the Alberta Labour Act and related only to persuasion. Berger J. acknowledged that the postal services should not be interfered with, but went on to say as follows.[164]

> Nevertheless, I think this Court must be vigilant to see that the right of these men to bring their grievance to the attention of the public is not impaired.

Berger J. clearly saw the exercise of fundamental rights as important. In 1960 the Federal Government had passed the Canadian Bill of Rights[165] which had recognized the existence in Canada of fundamental freedoms, including freedom of speech. Berger J. stated that[166] "These men have a fundamental right of free speech that cannot be taken away by provincial legislation."

In support of the above proposition Berger J. cited three cases decided by the Supreme Court before the Bill of Rights was passed.[167] These three cases were actually decided on the basis of an implied Bill of Rights theory from the British North America Act 1867 or on the constitutional basis of the division of powers. At the time Whitelock was decided it was quite clear that the Canadian Bill of Rights did not apply to provincial statutes.[168] However the recognition by Berger J. of the principle of free speech is illustrative of the fact that fundamental freedoms had been formally recognized in Canada.

The result of the case was that the pickets were allowed to demonstrate at the main entrance to each post office where they had access to the public, but not at the entrances where mail trucks stopped.

On the reasoning in the Whitelock case a picket only concerned with imparting information would not be unlawful. There would not have to be a legal strike for the picketing to be lawful. The point does not appear to have been considered in relation to section 100 of the Alberta Labour Act but the same reasoning should be applicable.

In 1974 in the case of Edinburgh Developers Ltd. and Cascade Builders Ltd. v. Vanderlaan Sentes and International Association of Heat and Frost Insulators[169] a rather more restrictive view of section 100 was taken by the Alberta Court of Appeal. The ruling in this important case has had implications for every workplace where more than one employer employs the workforce. The facts involved a construction site upon which fifteen subcontractors were working. The defendant union went on a lawful strike against two of the subcontractors and picketed the site. The evidence apparently established that usually only two pickets at a time would walk in front of the site carrying signs which read "Legal strike local 126 Asbestos Workers". There was no evidence of threats or intimidation. The result was that employees of the other thirteen subcontractors refused to cross the picket line and work came to a halt. The general contractor and the owner of the building being constructed obtained an injunction to stop the picketing. The union appealed against the order, but the Court of Appeal dismissed the appeal.

The central issue in the case was the interpretation of the two limbs of section 100. Subsection 1 allowed picketing at the employer's premises without acts otherwise unlawful and only when a lawful strike was in progress. The second subsection prohibited picketing in all other circumstances. The judgments in the Court of Appeal are interesting for the differing views as to why the picketing should or should not have been prohibited. Allen and Clement J.J.A. dismissed the appeal. Prowse J. dissented from the majority.

Allen J.A. first considered the common law and found that the object of the picketing was to induce other employees to break their employment contracts in not crossing the picket line. The purpose of the picketing went beyond mere persuasion. Such action was held to be within the definition of inducing breach of contract as laid down in D.C. Thompson and Co. v. Deakin.[170] With regard to the pickets' knowledge of the workers' employment contracts, Allen J.A. noted that no record of such contracts had been put into evidence. The workers may even have been employed on a day to day basis. However, he was prepared to infer that the pickets would have known that there was a contract of some sort between the subcontractors and their employees. Having noted that Thompson v. Deakin was applied in the Alberta case of Bennett and White Ltd. v. Van Reeder,[171] Allen J.A. went on to consider section 100.

The consideration of section 100 illustrates how confusing the words of the section are. Allen J.A. states as follows.[172]

> If we take subs(1) of s.100 by itself it would seem that peaceful picketing, without acts that are otherwise unlawful (e.g., violence), designed to persuade and endeavour to persuade anyone not to enter the employer's place of business, operations or employment is expressly permitted by law, even though this may operate to induce breach of contract.

On the above reasoning then, inducing breach of contract is not an unlawful act, even though Allen J.A. had spent the first half of his judgment establishing that at common law it is unlawful. Allen J.A. views "acts that are otherwise unlawful" to be in the nature of criminal acts although there is no explanation for this.

After considering section 100(2) Allen J.A. found that the conduct of the pickets had the effect of persuading employees of subcontractors not to work. This conduct was prohibited by section 100(2) and the injunction was therefore justified. In the view of the writer Allen J.A. could have reached this conclusion by a study of section 100(1) alone.

Clement J.A. found that breach of any part of section 100(2) was sufficient to constitute an unlawful act upon which to base liability in tort. The authority for this proposition he found in International Brotherhood of Teamsters v. Therein.[173] The terms of section 100(1) were a defence to a claim that an act was within section 100(2). Clement J.A. paid closer attention to the wording of section 100 and found the description of the employer to be crucial. In subsection one picketing is allowed at premises of the employer and in subsection two picketing is prohibited at the premises of an employer. The different words used were, in the view of Clement J.A., a clear indication that whenever picketing affects an employer who is not a party to the dispute, it must be prohibited - even if the employees are also picketing their own employer. He went on to say that the permission to picket[174] "...can be exercised only 'without acts that are otherwise unlawful'. The picketing in fact was otherwise unlawful since it necessarily constituted a breach of sub.(2)."

With regard to a cause of action Clement J.A. found that section 100 is not concerned with inducing breach of contract, but with interference with business. The judge adopted statements from other cases upholding the right to trade and concluded[175]

> We have, then, clear expressions by high authority that in law no person is to suffer interference in the lawful occasions of his business activities unless there is sufficient justification for the interference.

He found there to be no justification in this case because of the breach of subsection two.

Prowse J.A. dissented from the decision and would have allowed the appeal. He does the same balancing act with the two subsections, but found that they could co-exist. When contemplating section 100 Prowse J.A. said as follows.[176]

> In construing this section it is useful to keep in mind that picketing is one form of economic, sanction which if successful is bound to interfere with contractual relations between the employer and others with consequential interference with contractual relations between other persons neither of whom is a party to the dispute.

Prowse J.A. recognized the limitation of section 100(1).[177]

> In effect peaceful picketing is permitted but if criminal or tortious behaviour is adopted, such as violence, threats of violence, acts involving trespass or nuisance, or if they by the use of words or other means exhort others to engage in illegal or tortious acts, then all such activities would fall within the prohibition "without acts that are otherwise unlawful."

Despite reaching the above conclusion Prowse J.A. ingeniously found that the plaintiffs did not allege that the form of picketing was unlawful, but that the result of it was. The result was that other employees were induced to break their contracts. The judge held that "without acts otherwise unlawful" referred to the manner of picketing and not the result.

With regard to the relationship between subsections (1) and 2) Prowse J.A. had the following to say.[178]

> Subsection (2) prohibited all picketing "except as provided in subsection (1)". To interpret the words as limiting picketing to the "striking employees' place of employment" so long as that location is not also the place of employment of other persons would, for all practical purposes, abolish picketing.

If the legislature had intended this result, argued Prowse J.A., they would have added extra words to subsection (1). To say that the picketing was unlawful because others would not cross the picket line was not the use for which the word "unlawful" in subsection (1) was intended. It did not apply to the effect of the picketing, but to the conduct of the pickets.

Prowse J.A. considered the common law liability of the defendants for inducing breach of contract. He stated that the evidence only established that the defendants were making[179] "a general appeal for support". Such a definition of the conduct of the pickets by Prowse J.A. might suggest a finding that they were merely communicating information. The conduct of the pickets resembled the conduct of the pickets in the Whitelock case. Prowse J.A. stopped short of such a finding and held only that the defendants did not use any unlawful means. Relying on the Posluns[180] case he found that the pickets were justified in acting as they did because of the statutory privilege in section 100(1).

With regard to the fact that collective agreements or union contracts are generally regarded as binding in Canada, Prowse J.A. made the valid point,[181]

> "...that as many union contracts provide that members are entitled to respect picket lines of others, I would have some difficulty characterizing the acts of members of such unions in respecting a picket line as a breach of their contract of employment when they had bargained for and obtained the right not to be required to cross a picket line."

The three judgments in Edinburgh Developers thus display three very different perceptions of section 100. It is suggested that that of Prowse J.A. comes closer to the interpretation which is more consistent with the presumed legislative intention behind section 100(1). None of the judgments deal with the issue of information picketing in any detail. It may be that the issue was not raised by way of defence; however, the conduct of the pickets as described in the case certainly did not appear to go beyond imparting information. Since 1966 Alberta has had its own human rights legislation[182] which was revised into the Alberta Bill of Rights in 1972.[183] Freedom of speech was recognized as a fundamental freedom in the act, but this measure does not appear to have been brought to the attention of the court in Edinburgh Developers.

The Alberta Bill of Rights was modelled closely on the Canadian Bill of Rights.[184] Although the Supreme Court had largely used the federal statute as an aid to interpretation only,[185] the Court had in 1970 declared a federal statute to be inoperative when it was found to contravene the Bill of Rights.[186] Even if the Alberta Bill of Rights had been put to the appeal court in Edinburgh Developers as a tool of interpretation only, it might have aided the judges in making sense of section 100.

For reasons given above, it is suggested that the plain terms of section 100(1) can never make picketing to persuade others to do or not do something, lawful. Even if section 100(1) did make picketing in such circumstances lawful, then section 100(2) clearly contradicts subsection (1) in the case of multi-employer sites. The judges in Edinburgh Developers made clear choices in interpreting section 100 based upon their own comprehension of the section and undoubtedly their own beliefs. The view of Prowse J.A. is preferred because it does less harm to the assumed intention of the legislature to give positive rights to pickets. Such intention can be inferred by the very enactment of subsection (1) when previously the statute had only described when picketing was prohibited.

Above all the judgments in Edinburgh Developers illustrate that section 100 is unworkable in its present form. There is a clear need for the section to be clarified. Proposals for such clarification will be considered in Chapter 6.

III The Labour Injunction

(1) Basis for Injunctive Orders

In 1965 the Supreme Court of Canada held in Vieweger Construction Co. Ltd. v. Rush and Tompkins[187] that if a defendant subsequently wins a trial on the merits of the action, he is entitled to an order for an inquiry as to damages suffered during the operation of the injunction. This case did not involve a trade dispute and its relevance to labour injunctions is extremely limited because so few trade dispute cases ever proceed to trial.

In the case of Bird Construction Co. Ltd. v. Paterson[188] the appeal court held that when a plaintiff discontinues an action having obtained an interlocutory injunction, the defendant could file an application for damages suffered during the operation of the injunction. This case is also of limited importance to cases involving labour disputes. Many such cases do not proceed to trial because once the injunction is imposed, the picketing has to stop and very often the dispute is then over. The plaintiff has no incentive to discontinue or continue the action, so that it may just lie on the file - perhaps being dismissed at some point for want of prosecution, or, a settlement of the dispute may involve the plaintiff agreeing to take the action no further. The injunction therefore not only gives the plaintiff an advantage in that the picketing is stopped; it also gives the plaintiff a bargaining advantage.

In such instances the courts become indirectly involved in the bargaining process. When the bargaining power of the employer is supported by an injunction, it is not surprising that the unions view the situation as one of an alliance between the courts and the employer. It is not suggested that the courts should have no power to issue emergency orders where there is a clear transgression of the law, particularly if it involves some substantial danger to life or property. However, as has been shown through the cases, pickets very often do not know when their conduct may or may not constitute a nuisance, whether a defence of self-interest motivation will be upheld or whether all the elements of the tort of inducing breach of contract are present or not. The law is simply not clear enough for the unions to be penalized in the bargaining process for pursuing a course of action which is later judged to be unlawful.

The practice of granting interlocutory injunctions in the midst of a labour dispute was as readily accepted in Canada as it had been in Britain. The same tests were used by the judges to decide if the injunction should be granted or not. That is the plaintiff had to show that he had a prima facie case and the court would then consider where the balance of convenience lay in granting the injunction. In early Alberta cases involving picketing, only the appeal judgments are available. The appeal judges concentrate to a great extent on ascertaining what ground of liability the plaintiff has established and do not often consider the balance of convenience. As the granting of an injunction is a discretionary remedy appeal courts generally defer to the trial judge in matters connected with facts.[189] In Corbett v. Canadian National Printing Trade Union Lunney J.A. said,[190]

> The case which is under consideration seems to me to be pre-eminently one in which an appellate tribunal should be guided by the opinion of the judge who saw and heard the witnesses, and I did not find myself qualified to criticise or correct his conclusions as to the purpose which the defendants had in mind in following the path along which they travelled.

In 1970 when the Alberta Supreme Court considered Alberta Wheat Pool and Federal Grain Ltd. v. Butler,[191] Riley J. held that the purposes or objects of the National Farmers Union were[192] "gravely suspicious and perhaps illegal". Such a finding appears to have enabled the judge to hold that the plaintiffs had established a prima facie case. This was so despite the fact that he apparently could not decide if the picketing was legal or not, which is surely a pre-requisite of finding evidence of a prima facie case.

Riley J. went on to consider the balance of convenience. He said that he[193] was "exercising such interlocutory matters as "balance of convenience" and "irreparable harm". A closer examination of the judgment reveals that Riley J. does not consider these matters explicitly. There is little indication as to what constituted irreparable harm in this case and one can only assume that the balance of convenience lay with the plaintiffs as the injunction was upheld

When the Court of Appeal considered Edinburgh Developers Ltd. and Cascade Builders Ltd. v. Vanderlaan Sentes and International Association of Heat and Frost Insulators[194] the court paid remarkably little attention to the requirements for granting the injunction. Implicit in the majority judgments is the assumption that the plaintiffs have a prima facie case and that the balance of convenience lies with them but this is not made clear.

In 1975 the British case of American Cynamid Co. v. Ethicon Ltd.[195] decided that there was no rule of law that a court could not consider the balance of convenience test unless the plaintiff established a prima facie case. All that was required was that there be a serious question to be tried and the balance of convenience could then be examined. The merits of each party's case were only to be discussed if the amount of uncompensatable disadvantages to each party would not differ widely. The principles of American Cynamid do not appear to have been brought to the attention of the Appellate Division of the Alberta Supreme Court in a case decided one month later. In Dewar Insulation Inc. v. Sheetmetal Workers International Association[196] the court was considering the propriety of appeal courts' giving rulings in matters where the issue was settled before the appeal against the granting of an injunction could be heard. McGillvray C.J.A. held that the appeal courts should be prepared to do so to give direction for future cases and went on to discuss the merits of each party's case where an illegal strike was alleged. American Cynamid was not mentioned nor the fact that the plaintiff need only establish that there was a serious issue to be tried.

American Cynamid was followed in Alberta in a non trade dispute case in 1977.[197] In Chapter 5 it will be shown how American Cynamid was later followed in trade dispute cases also.

(2) Ex-parte Procedure

An aspect of interlocutory injunctions which gave the labour movement cause for concern was the fact that such orders could be granted on an ex-parte basis, that is, in the absence of the defendant.

In all applications for interlocutory injunctions the evidence was by affidavit only, based on information and belief. As this procedure excluded the possibility of testing the evidence by cross-examination, there were some grounds for concern that the process was being abused where the court could not assess the credibility of a witness. In an effort to obviate these possible abuses of process, the Judicature Act in Alberta was amended in 1960 as follows[198]

> (1) Notwithstanding the provisions of this Act, the Alberta Labour Act or any other Act of the Province, where a strike or lock-out exists in a labour dispute to which the Alberta Labour Act applies, no injunction before trial shall be granted ex parte to restrain any person from doing any act in connection with the strike or lock-out.
> (2) A copy of every affidavit intended to be used in support of an application for an interim injunction to restrain any person from doing any act in connection with the strike or lock-out shall be served with the notice of motion, and every such affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove.
> (3) Where members of a trade union, within the meaning of section 55 of the Alberta Labour Act, are the defendants or intended defendants, the notice of motion may be served upon any officer of the trade union or any member thereof engaged in the activity to be restrained or any person engaged in the activity to be restrained.
> (4) The notice of motion shall be served in sufficient time before the time fixed for hearing, not being less than three hours in any event, to enable the person served to attend at the hearing of the motion.

In comparison with the new section on picketing in the Labour Act, this section which outlawed the ex parte injunction was innovative. Britain was not to enact a similar section for another fourteen years. The provision in the Alberta statute did require some refinements. In the case of Nichol v. Maclaren[199] an injunction was granted ex parte to two businesses which operated in a hotel. The hotel was being picketed in pursuit of a dispute between the hotel owners and the hotel employees. As the two businesses in the hotel were not parties to the dispute, it was held that the new provisions of the Judicature Act did not apply. In 1970 the first sub-section was therefore amended to read,[201]

> Notwithstanding anything in this Act, the Judicature Act or any other Act, where a lawful strike or lockout exists in a labour dispute, no injunction before trial shall be granted ex parte to
> (a) a party to the dispute, or
> (b) any other person or party, to restrain any party to the dispute from doing any act in connection with the strike or lockout.

By 1970 the section had been taken out of the Judicature Act and incorporated into the Labour Act. The new section only dealt with the granting of labour injunctions ex parte and did not affect the criteria that were used by judges in deciding whether to grant the injunction or not.

Despite the innovative nature of the amendments to the Judicature Act in 1960 which prohibited ex parte injunctions in labour disputes, a study carried out in 1970[202] showed that the courts had continued to hear ex parte applications if the facts did not exactly fit the terms of the statute and that the rules governing affidavit evidence continued to be abused. Blame cannot be laid entirely on the judges. The conclusions of the author of the study are adopted that there is,[203] "...a lack of a clear legislative direction as to the policy contemplated to be embraced with respect to the adoption of labour relations legislation".

IV The Criminal Liability of Pickets

(1) Section 381 of The Criminal Code

(a) History of Section 381

In the introduction to this chapter it was shown how the Canadian Criminal Law Amendment Act of 1876[204] was based on the British Conspiracy and Protection of Property Act 1875.[205] In particular a section corresponding to section 7 of the British Act was included which dealt with the criminal offence of intimidation. A proviso for peaceful picketing was included[206] whereby a criminal offence would not be committed.

Criminal law is a matter within Federal jurisdiction in Canada. That is to say that it is formed by the Federal Government and is the same in all provinces. In 1892 the Criminal Law of Canada was codified.[207] The Code was based in part on a draft Code formulated in England which was never adopted by that country.[208] The Canadian Code included a section equivalent to section 7 of the 1875 Conspiracy and Protection of Property Act. In modern times it is section 381 of the Code and will be referred to as such. When first included in the Code in 1892 the proviso for peaceful picketing was omitted. There was therefore no equivalent to section 2 of the Trades Dispute Act 1906[209] in Britain. Such an omission created serious problems for pickets as will be shown by discussion of the cases.

In 1934 at the request of the Trade and Labour Congress, the Minister of Justice added a proviso for peaceful picketing to section 381.[210] The section now reads as follows:

> 381. (1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing
>
> (a) uses violence or threats of violence to that person or to his spouse or children, or injures his property,
>
> (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted upon him or a relative of his, or that the property of any of them will be damaged,
>
> (c) persistently follows that person about from place to place,
>
> (d) hides any tools, clothes or other property owned or used by that person, or deprives him of them or hinders him in the use of them,
>
> (e) with one or more other persons follows that person, in a disorderly manner, on a highway,
>
> (f) besets or watches the dwelling-house or place where that person resides, works, carries on business or happens to be, or
>
> (g) blocks or obstructs a highway,
>
> is guilty of an offence punishable on summary conviction.
>
> (2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

The following sections of this chapter study the sections of the Criminal Code which are of relevance to the practice of picketing. There do not appear to be reported cases concerning picketing in relation to each section of the Code of relevance. However by looking at some of the leading cases it is possible to speculate how the statutory sections might be used to deal with picketing and how the sections may be used in fact, in unreported picketing cases.

(b) The Criminal Liability of Pickets under Section 381

In interpreting section 381 of the Criminal Code, Canadian judges looked to the British jurisprudence which interpreted section 7 of the Conspiracy and Protection of Property Act. Inevitably this led the judges to the cases of Lyons v. Wilkins[211] and Ward Lock v. Operative Printers Assistants Society[212] and the conflicts therein.

In R v. Blacksawl,[213] two men were walking outside a theatre, handing out leaflets to the public concerning a dispute with the theatre management over wages and the employment of non-union musicians. The case was heard in 1925 so that the peaceful picketing proviso had not yet been enacted in the Criminal Code. The Appellate Division of the Alberta Supreme Court spent some time discussing the words "wrongful and without lawful authority" in section 381. There was much reference to Lyons v. Wilkins and none to Ward Lock. The court followed the reasoning of Lindley M.R. that,[214] "...it is not necessary to show the illegality of the overt acts complained of by other evidence than that which proves the acts themselves..."

Beck J.A. held that the two men could not raise as a defence to a charge of watching and besetting the union contract with the employer. The union contract specified that only union labour should be used. As there was no peaceful picketing proviso the convictions of the two men for watching and besetting were confirmed.

R v. Reners[215] involved a dispute in the mining industry over wages and the conduct of pickets who endeavoured to persuade others not to work for low wages. The Appellate Division of the Alberta Supreme Court was reminded that in the Blacksawl case, Ward Lock had not been considered. Harvey C.J.A. duly considered Ward Lock but found himself unable to find any substantial difference between that case and Lyons v. Wilkins. Speaking for the majority Harvey C.J.A. held that the defendants were guilty of watching and besetting. It will be remembered that at the time Ward Lock was decided section 2 of the Trade Disputes Act 1906 had not yet been passed. The peaceful picketing proviso in the Conspiracy and Protection of Property Act 1875 only protected obtaining or communicating information. Harvey C.J.A. accepted the finding of the trial judge in R v. Reners that the purpose of the picketing was persuasion and found that persuasion was outside the bounds of permitted activity, even in Ward Lock.

Clarke J.A. dissented from the majority and followed the Ward Lock decision. He held that the words "wrongfully and without lawful authority" in section 381 meant that a separately unlawful act had to be committed. The conduct that occurred in R v. Reners was not sufficient.

The case was appealed to the Supreme Court of Canada[216] where the judgments of Newcombe and Idington JJ. are reported. Speaking for the majority Newcombe J. upheld the conviction. The Supreme Court had to adjudicate on the point of law which had divided the Court of Appeal, namely the conflict between Lyons v. Wilkins and Ward Lock. Newcombe J. found that both of the British cases accepted that picketing could constitute a common law nuisance and would therefore be wrongful. He applied that reasoning to R v. Reners and found that the picketing therein constituted a nuisance and therefore amounted to an offence under section 381.

Idington J. agreed with the result of the majority, but for different reasons. He held, in accordance with Lyons v. Wilkins that watching and besetting was always wrongful at common law. No separate unlawful act was needed. Idington J. found that it was the existence of the peaceful picketing proviso which caused the difficulty in Ward Lock. He held that any British cases decided after the omission of the peaceful picketing proviso in the Criminal Code in 1892 were of no value, thus excluding any of the arguments raised in Ward Lock.

It will be remembered that the question of what degree of conduct was necessary to create a nuisance was not decided by Lyons v. Wilkins or the Ward Lock case. Vaughn Williams L.J. in Ward Lock did however agree with the proposition that picketing could constitute a nuisance in some circumstances. Therefore Newcombe J. was being quite consistent with both cases in finding that conduct in Reners did constitute a nuisance. The reasoning of Idington J. in R v. Reners is more suspect. The point that was raised before the Supreme Court was whether watching and besetting was unlawful per se or whether an independently unlawful act was needed. This argument turns on the phrase "wrongfully and without lawful authority" and is not affected by the contents of the proviso in the British statute. Therefore, to state as Idington J. did that cases decided after the proviso was re-enacted in British law in 1906 could not apply to Canadian cases and that therefore the choice between the two arguments is decided in favour of the Lyons v. Wilkins case is wrong. Lyons v. Wilkins was also decided after the Canadian criminal law was codified in 1892 and the peaceful picketing proviso was omitted. It was open to Idington J. to favour the interpretation in Lyons v. Wilkins over Ward Lock but not for the reasons he relied upon.[217]

After the Supreme Court decision in R v. Reners the law seems to be that the word "wrongfully" in section 381 applies to all the acts enunciated in the section including watching and besetting. Before the peaceful picketing proviso was re-enacted in 1934 all picketing would therefore be a criminal activity under section 381. By comparison in England at this time there was a certain degree of latitude. Firstly, the decisions of the Court of Appeal in Lyons v. Wilkins and Ward Lock were of equal weight and future courts could choose which to follow. Secondly, the peaceful picketing proviso had always existed since 1875[218] and was widened to include persuasion within its terms in 1906.[219]

Before the proviso was enacted in the Canadian Criminal Code, a reported case shows an Ontario Supreme Court judge as disregarding the Supreme Court decision in R v. Reners. In R v. Baldassarri.[220] Rose C.J. followed Ward Lock and held that[221] "...proof merely that the defendants acted with the view stated in s. 501 [formerly s. 381] of the Cr. Code is not proof that they acted wrongfully and without lawful authority..."

The court further found that the conduct of two people walking in front of a theatre wearing signs was not a common law nuisance.[222]

Since the peaceful picketing proviso was added to section 381 in 1934 there has only been one reported criminal case in Canada which has dealt with the provision. *R* v. *Carrothers*[223] was an Ontario county court case where it was held that it was not wrongful for a member of a picket line to use peaceful persuasion on an employee who was to enter the picketed premises to work. It would only be wrongful if force was used or access was blocked.

It should be noted that section 381(1)(g) provides for the offence of blocking or obstructing a highway. Section 381(1)(g) would correspond to the provision in ~~section 137~~ of the Highway Act 1980 in Britain. However unlike the British provision, section 381(1)(g) would appear to have been used infrequently to curtail the activities of pickets. Section 381(1)(f) was used far more often in relation to watching and besetting.

(c) The Civil Liability of Pickets under Section 381

Until it became well established in Canadian jurisprudence that breach of a labour relations statute could constitute the unlawful means necessary to the existence of an economic tort, section 381 of the

Criminal Code was mentioned often in civil cases as the basis for an injunctive order. Usually section 381 was not the sole basis upon which an injunction was imposed. A court would often find that conspiracy to injure or inducing breach of contract was also present. Although it was clearly established that breach of the criminal statute could also be a civil wrong, some judges were not willing to use a criminal statute in civil proceedings.

In 1909 the Manitoba Court of Appeal considered Cotter v. Osborne[224] where a strike had occurred because the employers would not sign a wage agreement. In pursuance of the strike the employees picketed the employer's premises to persuade others not to work there. As well as finding that the defendants were liable for inducing breach of contract, the trial judge also found that picketing to persuade others not to work was unlawful under section 381 of the Code. The appeal court approved[225] this aspect of the trial judgment and the injunction was made permanent.

Two years later in Vulcan Iron Works v. Winnipeg Lodge[226] the Manitoba courts noted the Ward Lock case. In Vulcan Iron Works a dispute over terms and conditions of work also resulted in a strike and picketing of the employers' premises. The trial judge, Mathers J., noted that the court in Ward Lock held that a separately wrongful act had to be committed to make the watching and besetting unlawful. However he found it significant that the peaceful picketing proviso was not in the Criminal Code. Rather than attempt to reconcile Lyons v. Wilkins and Ward Lock he noted that the cases did agree that picketing could constitute a nuisance.

Therefore the picketing outside the Vulcan Iron Works was actually enjoined on the basis of nuisance.

Schuberg v. Local International Alliance Theatrical Stage Employees[227] was a British Columbia case in 1927. After the dismissal of two employees at a theatre, the other employees went on strike and picketed the theatre. Handbills were handed out to the public and the plaintiff's business was affected. The Court of Appeal was evenly split as to the result of the case. Only two of the judges dealt with section 381. Martin and Macdonald JJ.A both would have allowed the appeal by the trade union defendants on the basis of provisions in the British Columbia Trades Union Act which allowed unions to publish certain information.

In passing Martin J.A. referred to the Reners and Blacksawl cases and stated that they were of no relevance in a civil matter. Macdonald C.J.A. dismissed the appeal by the trade union defendants on the basis that they were liable for conspiracy to injure the plaintiffs.

McPhillips J.A. also dismissed the appeal. In addition to finding that there was a conspiracy to injure, he adopted the judgment of Idington J. in R v. Reners.[228] He therefore accepted the view that watching and besetting was always wrongful at common law and could be the basis of a civil action.

When the peaceful picketing proviso was added to the Criminal Code the Manitoba Court of Appeal had occasion to consider it in Allied

Amusements Ltd. v. Reaney.[229] Once again the facts involved picketing outside a theatre. The picketing was in pursuance of a request to the employer to recognize a union. The request had been refused. The evidence showed that the pickets carried notice boards, but the picketing was peaceful. The plaintiffs action was based on section 381.

Trueman J.A. reviewed the British case law and statutes. He then stated what was in his view the relevant common law position.[230]

> I take it to be clear that picketing, or "watching and besetting" which is the legislative equivalent, conducted peaceably, that is, without violence and other intimidation or other wrongful or illegal means, though for the purpose of compelling or inducing employers to employ none but union labour, is legal at common law and that nothing in s. 501 [now s. 381] of the Code qualifies or overrides it.

Trueman J.A. would have allowed the defendants appeal on the basis of the above statement but was overruled by the majority judgment given by Robson J.A. The latter interpreted Ward Lock to mean that there was an accepted scope of lawful activities which would not be wrongful and without lawful authority. The picketing in the present case went beyond the accepted scope of activities because the pickets were trying to persuade the plaintiff to do something he had a lawful right not to do. The picketing had therefore been correctly enjoined by the trial judge.

Although the distinction is not clearly made by Robson J.A. it is important to note that after 1906 the peaceful picketing proviso in Britain covered persuasion.[231] The proviso to section 381 of the Criminal Code still only covers obtaining and communicating information. There is thus a lower threshold of illegality for picketing in the Canadian statute.

The interpretation of the common law and its relationship to section 381 by Trueman J.A. quoted above, was approved by the Ontario Supreme Court in Canadian Dairies Ltd. v. Seggie.[232] One defendant was demonstrating outside the plaintiffs premises. The defendant had never been employed by the plaintiff and the court held that that fact alone was not sufficient to establish a wrongful purpose. Mackay J. said[233] "...picketing is only wrongful; (a) if it is featured by defamatory statement or (b) if it is carried on in such manner as to disclose a purpose other than 'peacefully obtaining or giving information' or (c) if it is part of a conspiracy to injure". He refused to alter the limited terms of the injunction set by the trial judge.

In 1951 the Supreme Court of Canada considered the case of Williams v. Aristocratic Restaurants.[234] The facts involved the issue of secondary picketing whereby pickets sought to put pressure on an employer by picketing several other of his outlets in Vancouver. By a majority, the court held that peaceful picketing without any attendant tort or crime did not fall within s. 381 of the Criminal Code. The judgments are comprehensive and deal with all the arguments put forward against picketing, including the conflict in the Lyons and Ward Lock cases, construction of the Criminal Code and breach of the Labour Relations statute.

Kerwin J. used the common denominator of nuisance in the Lyons and Ward Lock cases and found that the conduct in this case did not constitute a nuisance. Rand J. bravely tackled the difference in reasoning in the two cases on the question of whether persuasion is included in the communication of information. He favoured the Ward Lock view that,[235] "To compel by the lawful effects of such persuasion for such purpose is a normal incident of industrial competition" and such conduct does not constitute a nuisance. Rand J. also found no breach of the British Columbia Industrial Conciliation and Arbitration Act,[236] because the Act did not touch "these ancillary means of advancing the interests of either party."2[37] He also considered that,[238] "...the public is obviously and substantially interested in the fair settlement of such contests" thereby introducing an element of public policy in the unions' favour.

The dissenting judgments of Locke J. and Rinfret C.J.C. concentrated on defining the conduct of the two pickets outside the restaurant as a private nuisance which entitled the plaintiff to recover damages.

The Aristocratic case does mark the highest point of judicial tolerance towards picketing in Canada.[239] However, the tolerance did not last and subsequent cases were to diminish the rights that the case had accorded to pickets. Hindsight enables one to see exactly how this was possible. By adopting the reasoning based on nuisance from the Lyons and Ward Lock cases, subsequent judges could make a finding that particular conduct did constitute a nuisance without giving reasons for reaching this conclusion. This is a reason why the doctrine of nuisance is arguably inappropriate for application to the law of picketing. Also, the plaintiff in the Aristocratic case was more concerned about the effect the picketing was having on his potential customers. This is reflected in the tone of the judgments and the preoccupation with the law of nuisance. Once it had been established that breach of a labour relations statute could constitute unlawful means the emphasis could shift to the effect of picketing on other employees. Later cases were to concentrate on the allegation that picketing was inducing breach of workers' contracts and causing an illegal strike when workers would not cross picket lines. Just four years after the Aristocratic case, McLennan J. remarked in the Ontario case of Smith Brothers Construction Co. v. Jones[240] that,

> ...in my opinion, if the development of the Trade Union Movement has reached the point where workers will not cross a picket line to go to work that is just as effective an interference with contractual relations as any other form of restraint might be.

As the above cases show Canadian judges as a whole did not accept quite so readily as their English counterparts that a civil action could be based on the breach of a criminal statute. Some judges chose not to address the matter at all[241] - even when it is clear that the matter was brought to their attention. Other judges clearly stated that the criminal and the civil law were quite separate.[242] Some judges did discuss section 381 in the context of the civil law, but often liability was mixed up with findings of nuisance and conspiracy.[243] The most detailed judgments on section 381 are to be found in the criminal case of R v. Reners,[244] whereas in Britain the most detailed judgments on section 7 of the 1875 Act are in the civil cases of Lyons v. Wilkins[245] and Ward Lock.[246]

Fortunately perhaps for the Canadian judiciary they did not have to struggle with the issue once it became clear that civil liability could be based on breach of a labour relations statute. Theoretically it is still of course possible to base a civil action on breach of section 381 of the Criminal Code.

(2) Other Sections of the Criminal Code Relevant to Picketing

(a) Mischief; section 387

Apart from section 381 there are other sections of the Criminal Code which are relevant to picketing and which correspond to similar offences under British law. Riot[247] and unlawful[248] assembly are defined in the Code, as is a power of arrest for peace officers who witness a breach of the peace.[249] However the charge which is more often used to control unruly behaviour causing damage to property is that of mischief in section 387 of the Code.

Section 387 is set out in full in Appendix 2. It was enacted in the present form when the Code was revised in 1970.[250] Before that there existed a series of sections imposing penalties for such specific offences as damaging railway sleepers,[251] and damaging any ships[252] or bridges.[253] The more general terms of the present day section 387 are directed towards the damage, destruction or interference with the use of property. Subsection 6 specifically excludes from liability for mischief employees who are on strike. It is interesting that the exclusion is not limited to those who are taking part in a legal strike only.

There is also an exclusion in subsection (7) for those who approach a house or place in order to communicate or obtain information. There was no reported case in relation to picketing which considered section 387 until R v. Mammolita[254] in 1983. This case will be considered in Chapter 5.

(b) Riot and Unlawful Assembly

As indicated above the offences of riot, unlawful assembly and causing a breach of the peace all appear in the Canadian Criminal Code. There would appear to be few reported cases involving the commission of these offences in relation to industrial disputes. That is not to state that the offences would not have been used often in the policing of industrial disputes in Canada.

The offence of unlawful assembly has changed little since it was first enacted in the Code in 1892.[255] In modern times section 64 provides that an unlawful assembly consists of three or more people who, with a common purpose, cause others to fear that the demonstrators will disturb the peace tumultuously, or cause others to disturb the peace. That was the verdict in R v. Beattie[256] in 1931 when 200 - 300 unemployed converged on Winnipeg City Hall.

In R v. Jones[257] in 1931 the Appellate Division of the Alberta Supreme Court considered the situation where pickets were persuading unemployed people not to work for reduced wages. The City of Calgary had devised a scheme whereby unemployed people were picked up at meeting points and given a job. When city workers arrived one day to pick up the unemployed a large crowd had gathered to demonstrate and to persuade the unemployed not to work for low wages. The defendants who were demonstrating were charged with unlawful assembly.

Harvey C.J.A. found that the manner in which the assembly conducted itself was important when considering the charge of unlawful assembly. He found that in this case the conduct was such that it could have resulted in a riot. Also to be taken into account were the circumstances in which the assembly occurred. In Jones Harvey C.J.A. took into account a strike manifesto which had been circulated the previous day. The appeal against conviction was dismissed.

In R v. Thomas[258] in 1971, the County Court of Vancouver considered the situation where demonstrators were blocking a roadway by sitting down. The case was not one involving a trade dispute. An eighteenth century British case[259] was used to support the proposition that demonstrators, either sitting down or standing up have no legal right or justification to block the free movement of other members of the public. The British Columbia court did not mention that the demonstrators had freedoms to exercise also; freedom of assembly and freedom of expression. It may be that these freedoms were not drawn to the attention of the court. However it is somewhat disturbing that guidelines for civil liberties in the second half of the nineteenth century were found in a case that had been heard almost one hundred years earlier. The defendant in R v. Thomas was convicted of unlawful assembly.

A riot is simply described in the Code[260] as "...an unlawful assembly that has begun to disturb the peace tumultuously". It is therefore committed by three or more persons. In cases where there is doubt as to whether a riot did in fact occur, the lesser offence of unlawful assembly could be proved instead.[261]

(c) Obstruction of a Peace Officer; section 118

Section 118 of the Code provides for the offence of resisting or wilfully obstructing a peace officer in the execution of his duty. In 1947 the Supreme Court of Canada considered what was within the execution of a policeman's duty. In Johanson v. R[262] members of a trade union on strike were selling tags on the street to raise money. The defendant was asked by a police officer to move along. The policeman returned after a while to find the defendant in the same place. The defendant refused to move and was arrested and charged under section 118. The Supreme Court quashed the conviction on the basis that there was no evidence that the public was inconvenienced. The policeman was enforcing a by-law against loitering, but tagging was outside the terms of this by-law. Therefore the policeman was not acting in the execution of a duty imposed upon him.[263]

In Knowlton v. The Queen[264] the question of what the duty of a policeman was came before the Supreme Court of Canada again. The defendant had pushed into a restricted area to take pictures of the Russian premier. The trial judge acquitted the defendant on the basis that the police were not enforcing any law that would justify an arrest without warrant. The Supreme Court did not accept the reasoning of the trial Judge. Fauteux C.J.C. looked at the Alberta Police Act[265] and found that section 30 stated that a duty of a police officer was to preserve peace, prevent a crime and apprehend criminals. The security measures of the police were therefore justified in pursuance of this duty.

The duty of the police as enunciated in Knowlton is thus extremely wide. It would suggest that a policeman can arrest anyone who obstructs him in preserving peace. The implications for an activity such as picketing are that a police officer can arrest pickets if he feels that a particular picket line is not preserving the peace. The question of whether or not the peace was disturbed is a subjective one and it is likely that a court would rely on the police officers' evidence in this regard.

Section 118(a) actually has two parts. As well as wilfully obstructing, a person may commit the offence of resisting a peace officer in the execution of his duty. In R v. Alaimo[266] the defendant, whilst striking legally, threw a garbage can at a truck passing through a picket line. He had already been warned by the police to let the truck pass. He was arrested for resisting a police officer in the execution of his duty. The York Provisional Court in Ontario held that resist implies some direct confrontation and some degree of force. In this case the throwing of the can challenged police authority but did not fulfill the requirements of the offence as charged. It was held that for an offence under section 118 to be committed there had to be some direct confrontation with the peace officer and some small degree of force by the defendant against the peace officer. Circumstances such as those that occurred in the British case of Piddington v. Bates,[267] when the accused gently pushed the policeman, would therefore come within section 118(a).

In R v. Alaimo the defendant was acquitted. The difficulty in proving the offence of resisting may account for the fact that there would appear to be more charges made for the offence of wilfully obstructing.[268]

(d) Disorderly Conduct and Causing a Breach of the Peace; section 31, section 171

Section 31 of the Code gives a power of arrest to a peace officer who witnesses a breach of the peace.

Section 171 relating to disorderly conduct has its origins[269] in the Vagrancy Act of 1869.[270] When the criminal law was codified in 1892 the essential provisions of the Vagrancy Act were included.[271] At that time a separate offence of affray[272] was included in Part V of the Code entitled "Unlawful Assemblies, Riots and Breaches of the Peace". Affray is the act of street fighting. There was thus a clear distinction between causing disturbance by vagrancy and other breaches of the peace. In 1908 the vagrancy section was to be found in the part of the Code called "Offences against religion, morals and public convenience".

A problem arose in that the courts were unwilling to determine that every one who did an act contrary to the provisions of the vagrancy section was a vagrant. Therefore an amendment in 1947[273] added a section to those dealing with nuisance. The new section provided that anyone who caused a disturbance in a public place by a specified group of acts was guilty of an offence. In 1955 when the Code was revised the offence of affray was omitted.

Section 171 is a summary offence and is still separated in the Code from offences such as riot and unlawful assembly. Unlawful assembly is a summary offence and riot is an indictable offence with a maximum jail sentence of two years.

Section 171 is thus now completely separate from the sections dealing with vagrancy. In 1975 one further amendment was made. In interpreting section 171 the courts had held that it was not necessary to hear as witnesses members of the public who said that they had been disturbed. The court could infer the fact of a disturbance from a police officer's testimony as to the conduct of the public. The 1975 amendment codified this statement of the law.[274]

The terms of section 171 are sufficiently wide to include picketing. In R v. Cruise[275] a magistrates court in Manitoba dealt with demonstrators who had formed a picket line outside a Canadian Broadcasting Company building and were protesting at anti-communist programmes aired by the C.B.C. Barichuk P.M. found that freedom of speech and freedom of expression were not issues in the case. He accepted that the accused had the right to hold their own views, but did not have the right to disseminate those views as they saw fit.

He found the accused guilty because they were shouting which was prohibited conduct under section 171. The shouting had caused a disturbance in that others had gathered to see what was going on.

In R v. Goddard[276] the Ontario Supreme Court considered an appeal where a provincial judge had convicted the defendant under section 171. The defendant had directed a picket line formed to prevent strikebreakers on a bus from entering the employers premises. The Supreme Court quashed the conviction. It was found that although the picket line did block the passage of the of the strikebreakers, there was no evidence that anyone was disturbed by this conduct.[277] "Disturbance in the sense of emotional disturbance on the part of some person as a result of someone else's disorderly conduct is not the kind of disturbance contemplated by the statute." It was found that there was no noise, commotion or reprisal caused by the conduct of the defendant.[278]

The views of the Ontario Supreme Court were reinforced by the New Brunswick Supreme Court in a non trade dispute case, R v. C.D.[279] In that case the accused had shouted in a public street after a car accident. Annoyance or emotional upset caused by the shouting was held not to be sufficient to create a disturbance. However in 1978 the Nova Scotia Court of Appeal took a different view in Swinimer v. R.[280] The case involved a fight between father and son in a street. The Court of Appeal held that the disturbance was to be found in the doing of any of the acts prohibited by section 171. There was no requirement that the doing of the acts should result in a separate disturbance. Macdonald J.A. and Cooper J.A. found that the offence was committed if an act within section 171 was done in circumstances where the Court could infer that a member of the public was disturbed or might reasonably be disturbed. Mackeigan C.M.N.S. found that whether a disturbance had occurred was a question of fact to be answered after taking into account the circumstances of a particular case.

If the view in R v. Swinimer[281] prevails, defendants such as Mr. Goddard on picket line duty may be convicted of an offence under section 171. The terms of section 171 can be read in either fashion, that is that the prohibited conduct is a disturbance in itself or that a separate disturbance must be caused. However it is suggested that if a subsequent court should look to the mischief that section 171 is designed to prevent, the court will find that it is the prevention of the prohibited acts and not a separate disturbance caused as a result. As indicated above such a finding may have serious implications for those on picket lines.

(e) By-Law Offences

Regulations for the procedure of parades and public meetings is provided for in city by-laws. This aspect will be dealt with in its contemporary form in chapter 5.

IV Conclusion

The first Canadian statutes which regulated the activities of trade unions were modelled on British statutes. The same philosophy lay behind the statutes in both countries; that trade unions were illegal conspiracies as being in restraint of trade. Liability for criminal conspiracy was removed but the act of picketing was clearly prohibited. In Britain peaceful picketing to obtain or communicate information was allowed. In Canada such a proviso was omitted from the Criminal Code until 1934.

In Britain the statute law relating to trade unions developed side by side with the common law until the 1970s. By contrast, in Canada the Federal Government early in the twentieth century embarked upon a programme of regulation of and intervention in trade union affairs.

One of the main aims of the 1907 Industrial Disputes Investigation Act was to avoid strikes. This is a feature of Canadian labour legislation to the present day. Although the right to strike was preserved, it could only be resorted to by following certain conciliation and administrative procedures. When the provinces were given jurisdiction over labour relations in 1925 the delay of the work stoppage was incorporated into provincial legislation.

Legislation in the United States also played a part in the evolving provincial statutes. By the 1970s the Alberta Labour Act was a comprehensive piece of legislation. If workers in a bargaining unit wished to strike a vote had to be taken. Notice of a strike had to be given and a strike could not occur during the life of a collective agreement. Picketing was only legal during a lawful strike and had to be practised peacefully and without acts that were otherwise unlawful.

All the time that the statutes were being refined the common law in Canada relating to industrial disputes continued to develop. The economic torts of conspiracy, intimidation and inducing breach of contract were applied to picketing situations. The jurisprudence differed in some ways from the jurisprudence that had developed in Britain. Simple conspiracy was often discussed by Canadian judges in terms of conspiracy to injure. Often however unlawful means were present so that it is hard to distinguish conspiracy to injure from conspiracy to use unlawful means in the Canadian cases.

The defence of justification was discussed in relation to inducing breach of contract far more extensively than it had been in Britain. However the tort itself did not develop into such a sophisticated form as it did in Britain. This was also the case with the tort of intimidation which is generally restricted to the definition of criminal intimidation in the Criminal Code. In Britain the case of Rookes v. Barnard considerably widened the scope of intimidation. An important point of distinction is that in Britain, as in the Rookes case, the third party employee who suffered damage had a cause of action. The employer who was threatened but suffered no damage did not have a cause of action for intimidation. The Canadian cases have suggested that the employer can sue for the threats made to his employees.

A distinguishing feature of the Canadian jurisprudence after 1961 was that the Canadian judges found that breach of the provisions of a labour relations statute constituted unlawful means upon which to base tortious liability. The Canadian judges did not always apply the ratio lifted from British cases strictly. For example Thomson v. Deakin was often cited but the distinction between direct and indirect breach of contract was not always made clear. In a sense Canadian judges were more free than their British counterparts because there were no restrictions on the liability of trade unions when pursuing industrial action. The Canadian judges did not have to interpret a measure such as the 1906 Trade Disputes Act.

In some cases Canadian judges anticipated later British jurisprudence. This may be a feature of the point mentioned above - that the Canadian judges were not kept within statutory guidelines with regard to tortious liability. Thus, the situation in Williams v. United Mine Workers of America was extremely similar to the later British case of Rookes v. Barnard. The threat to strike in Williams was held to be unlawful per se, whereas in Rookes v. Barnard it was called intimidation. In reality the actions by the defendants were the same but they were given different tortious labels.

Such a comparison can also be made with cases such as Krug Furniture Co. v. Union of Wood Workers and Thomas v. N.U.M. In the former case a Canadian judge labelled the treatment of strike-breakers by pickets as intimidation. In the latter case the same type of conduct was called harassment.

The labour injunction was used in Alberta and in 1960 a provision was introduced to control abuses of ex-parte procedure. The judges continued to apply common law rules as to when an injunction should be imposed. The same criteria of prima facie case and the balance of convenience were used as in Britain. These criteria generally favoured the plaintiff in a labour dispute.

The injunction has also been used to enforce the criminal law in Canada and in particular the watching and besetting provisions of the Criminal Code. The cases of Lyons v. Wilkins and Ward Lock have been discussed. Ward Lock was accepted by the Supreme Court of Canada in Williams v. Aristocratic Restaurants and peaceful picketing was held not to be a nuisance. The malleable concept of nuisance has since permitted the majority of Canadian judges to distinguish the case of Aristocratic Restaurants.

The courts have not interpreted section 100 of the Alberta Labour Act as prohibiting all forms of picketing - maybe because an argument in that vein has never been put to them. However the courts have interpreted section 100 in strict fashion where other employees would not cross a picket line as in Edinburgh Developers. Information picketing is in theory excluded from the operation of section 100. However any information picketing that is effective will then be defined as persuasive and will be enjoined. The value of the freedom to impart information is therefore very limited.

The Criminal Code contains similar public order offences to those that appear in British statutes. The offences such as intimidation, mischief and public disorder are all relevant to picketing. In addition the police also have the power to arrest for obstruction of the police in the course of their duty.

A growing trend in the labour relations statutes of Alberta has been to exclude various groups of employees from its operation. Some of these employees are completely deprived of the right to strike and the right to picket. Compulsory arbitration provisions replace the right to strike. Those employees who do have the right to strike are quite limited in the type of picketing they can practice whilst on strike. It has also been suggested that even those who do have a right to strike are not able to picket persuasively within the Alberta Labour Act. In fact persuasive picketing is impossible within the strict terms of section 100 because of the phrase "wrongful and without lawful authority". Effective and persuasive picketing inevitably leads to a charge of inducing breach of contract which is wrongful.

By contrast in Britain at the end of the 1970s the legislative scheme of TULRA contained the immunities from liability in tort which gave trade unions more freedom to take industrial action. The restriction on this freedom came from the judiciary who would often exclude the industrial action from the operation of the statute. In practice therefore the activities of pickets were as severely curtailed as they were in Alberta.

FOOTNOTES - CHAPTER 4

1. Slow, because of the distances between urban centres and because of the largely agrarian economy of the time.

2. See S. Jamieson Industrial Relations in Canada (1957) Ch. II at 29 et. seq.

3. S.C. 1872, c.30.

4. S.C. 1872, c.31.

5. The owner the 'The Globe'. George Brown, was in fact a political opponent of the Conservative Prime Minister Sir John A. Macdonald. The latter was mindful when he passed the legislation of impending federal elections. See Peach and Kuechle The Practice of Industrial Relations (2nd ed. 1985) at 24.

6. 1871 (U.K.), 34 and 35 Vict. c.31.
1871 (U.K.), 34 and 35 Vict. c.31.

7. Supra, n. 3, s.2.

8. Supra, n. 4, s.1.

9. D. Morton and T. Copps Working People (1980) at 27.

10. The C.C.F. first met in Calgary in 1932. It consisted of the Western labour parties, representatives of farmer political organizations and members of the Socialist party. The party was successful both in federal elections and provincial elections in the years preceding and during W.W.2. A C.C.F. Government was elected in Saskatchewan in 1944. The influence of the party gradually decreased after W.W.2 largely due to rivalry with the Communist Party.

11. S.C. 1875, c.40.

12. S.C. 1876, c.37.

13. Supra, n. 11, s.2 - unless the offence was indictable or punishable under the provisions dealing with picketing offences.

14. (U.K.) 38 and 39, Vict. c.86.

15. Supra, n. 12, s.2.

16. S.C. 1892, c.29.

17. S.C. 1900, c.24.

18. See Adams Canadian Labour Law (1986) at p. 607, Carrothers Collective Bargaining Law in Canada (2nd ed. 1986) at p. 32.

19. Councils of Conciliation Act 1967 (U.K.), c.105, Conciliation Act 1896 (U.K.) c.30.

20. S.C. 1903, c.55.

21. R.S.C. 1906, c.96.

22. See W. Caragata Alberta Labour (1979) At p.9.

23. See Lab. Gaz. (1906) VII, at 647 and 1108. The union did not obtain formal recognition, but the company agreed to not objecting to employees belonging to the union.

24. S.C. 1907, c.20. The Act was to some extent based on legislation in Australia and New Zealand. See Carrothers Collective Bargaining Law in Canada (2nd ed. 1986) at 36 and Woods and Ostrey Labour Policy and Labour Economics in Canada (1962) at 41-3.

25. S.C. 1907, c.20. See Appendix 2.

26. Mining, transportation, communication or public service utility. At this time in Canada these industries would have embraced much of the workforce.

27. 6 Edw. VII, c.47.

28. See Adams Canadian Labour Law (1986) at 8.

29. See Adams ibid. at p.8 n. 38, Carrothers supra n. 2 at p. 36-7 n. 28, Dankert 'Canadian Industrial Disputes Investigation Act 1907' (1928) 36, J. Pol. Ec. 141, Woods and Ostrey supra n. 2 at pp. 50-55, 'Report by Sir George Askwith, K.C.B., K.C. to the Imperial Government on the Industrial Disputes Investigation Act of Canada 1907', 13 Lab. Gaz. 1239 at p. 1243-7.

30. S.M. Jamieson 'Patterns of Industrial Conflict' Ch. 29 in S.M.A. Hameed Canadian Industrial Relations (1975).

31. S.C. 1892, c.29.

32. [1901] A.C. 495.

33. Ibid.

34. [1898] 28 S.C.R. 241.

35. [1893] A.C. 1.

36. See I. Christie The Liability of Strikers in the Law of Tort (1967) at 89. See also p. 131 where the author mentions the earlier case of Hynes v. Fisher (1883) 4, O.R. 60 where an Ontario trial judge ignored the English precedents in a case which could have been decided on the same basis as Lumley v. Gye (1853) 118, E.R. 749.

37. (1918), 38 D.L.R. 183.

38. [1901] A.C. 495.

39. 6 Edw. VII, c.47.

40. [1942] A.C. 435.

41. Rights of Labour Act, R.S.O. 1980, c.56; B.C. Labour Code s.89; Sask. Trade Union Act, s.28.

42. (1943) 4, D.L.R. 441.

43. Supra n. 39.

44. Supra n. 41 at p. 452.

45. E.g. Hersees of Woodstock v. Goldstein (1963) 38, D.L.R. (2d.) 449.

46. E.g. Dusessoy's Supermarkets Ltd. v. Retail Clerks Union 832 (1961), 30 D.L.R. (2d) 51.

47. (1911) 21, Man. L.R. 473.

48. Now see R.S.C. 1970, c.C-34, s.381.

49. There was generally a requirement that a strike vote be taken. If the vote was for a strike at least 14 days notice of the strike had to be given

50. [1918] 14, A.L.R. 25.

51. [1901] A.C. 495.

52. Ibid. at p. 259.

53. [1898] A.C. 1.

54. Supra n. 50 at p. 283.

55. [1919] 49, D.L.R. 578.

56. Ibid. at p. 583-4.

57. [1964] A.C. 1129 and see Ch. 2 at p. 20.

58. Supra n. 55 at p. 588.

59. See e.g. Williams v. United Mine Workers of America [1918] XIV, A.L.R. 25.

60. [1948] 3, D.L.R. 178.

61. [1948] A.C. 435 at p. 462.

62. [1960] S.C.R. 265.

63. [1961] S.C.R. 435.

64. Ibid., Ritchie J. at p. 446.

65. Supra n. 63 at p. 461.

66. Supra n. 63 at p. 463.

67. See Christie I., The Liability of Strikers in the Law of Tort (1967) at p. 101.

68. (1853), 2 E. and B. 216.

69. [1905] 10, O.L.R. 284; see also Krug Furniture Co. v. Berlin Union of Amalgamated Woodworkers (1903) O.L.R. 463.

70. [1905] 10, O.L.R. 284 at p. 287.

71. [1950] S.C.R. 385.

72. Ibid. at p. 397.

73. (1956) 6, D.L.R. (2d.) 326.

74. Ibid. at p. 329.

75. [1955] 4, D.L.R. 255.

76. Ibid. at p. 26.

77. (1964) 46, D.L.R. (2d) 210.

78. See e.g. Edinburgh Developers Ltd. v. Vanderlaan. [1974] 3 W.W.R. 481.

79. (1964) 45, D.L.R. (2d.) 79.

80. [1952] Ch. 646.

81. See e.g. Bennett and White (Alberta) Ltd. v. Van Reeder (1956), 6, D.L.R. (2d.) 326.

82. Gagnon v. Foundation Maritime Ltd. [1960] S.C.R. 435.

83. R.S.C. 1970, c.C-34, s.381.

84. [1964] A.C. 1129.

85. (1903) 5, O.L.R. 463.

86. Ibid. at p. 466.

87. Supra n. 87 at p. 467.

88. [1985] I.R.L.R. 136.

89. [1950] 2, D.L.R. 850.

90. Ibid. at p. 855.

91. Supra n. 88.

92. (1911) 21 Man. L.R. 473.

93. (1970) 75, W.W.R. 652.

94. Ibid. at p. 658.

95. [1960] S.C.R. 265.

96. [1964] A.C. 1129.

97. (1919) 49 D.L.R. 578.

98. (1963) 42, D.L.R. (2d.) 382.

99. (9164) 49, W.W.R. 237.

100. [1976] 2, S.C.R. 200.

101. R.S.M. 1970, c.P-50.

102. [1974] 4, W.W.R. 394.

103. [1976] 2, S.C.R. 200 at p. 218.

104. Ibid. at p. 219.

105. (1971), 17, D.L.R. (3d) 128 - For discussion of similar cases preceding R v. Peters see Arthurs "Picketing on Shopping Centres" (1965) 43 C.B.R. 357.

106. Supra n. 100 at p. 209.

107. Supra n. 100 at p. 208.

108. Supra n. 100 at p. 212.

109. R.S.A. 1980, c.P-6. In Manitoba where *Harrison* v. *Carswell* originated the Petty Trespass Act has been amended to provide an exception from liability for those who communicate true oral or written statements - even where the business operator owns the premises. S.M. 1976, c. 71, s.2. For the terms of the Alberta Act see Appendix 1.

110. (1963) 38, D.L.R. (2d) 449; see criticism of case in Carrothers *Collective Bargaining Law in Canada* (2nd ed. 1986) at p. 672-6.

111. [1950] S.C.R. 385.

112. 1867 (U.K.) c.3.

113. See Carrothers *Collective Bargaining Law in Canada* (2nd ed. 1986), p. 38, n. 38, Caragata *Alberta Labour* (1979) at p. 35, n. 29, Dankerts supra, n. 29.

114. [1925] A.C. 396.

115. An Act to Amend the Industrial Disputes Investigation Act, 1907, S.C. 1925, c. 14.

116. E.g. *Montcalm Construction Inc.* v. *Minimum Wage Commission* [1979] 1 S.C.R. 754 where construction workers at an airport were subject to federal legislation.

117. S.A. 1926, c.53.

118. Ibid., s.2(c).

119. S.A. 1928, c.42.

120. Even Canadian unions were split between the Trades and Labour Congress, the All Canadian Congress of Labour, and the Canadian Catholic Federation of Labour in Quebec.

121. See D.Morton and T. Copp *Working People* (2nd ed. 1981), ch. 8 at 67.

122. (1898), 30 Stat. 424.

123. National Labour Relations Act c.372, 49 Stat. 449 (1935).

124. W. Caragata *Alberta Labour* (1979) at p. 121.

125. S.A. (1937) c.75. See Appendix 2.

126. S.A. (1938) c.57. See Appendix 2.

127. See H.D. Woods "Canadian Collective Bargaining and Dispute Settlement Policy: an appraisal" (1955) *McGill L.J.* 447 at pp. 457-8.

128. S.C. 1948, c.54.

129. R.S.A. Industrial Conciliation and Arbitration Act 1942 c.280.

130. S.A. 1947, c.8. See Appendix 2.

131. Ibid. s.5.

132. S.A. 1938, c.57, s.54.

133. S.A. 1970, c.63, s.54.

134. E.g. as in *North Fork Timber Co. Ltd.* v. *Mackenzie* (1964) 45, D.L.R. (2d.) 79.

135. *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426.

136. See e.g. *Medalta Potteries Ltd.* v. *Longridge* [1947] 2 W.W.R. 856.

137. See B. Adell "*International Brotherhood of Teamsters* v. *Therien* and the suability of trade unions in Alberta" 1955-61, 1 *A.L.Rev.* 571.

138. S.A. 1948 c.76, s.5.

139. A more conservative attitude of the government was particulary evident when Premier Aberhart died and E.C. Manning became Premier in 1943.

140. For example the strike in 1954 by beer parlour workers in Alberta belonging to the Hotel and Restaurant Employees Union. See Caragata supra n. 124 at p. 141.

141. S.A. 1960, c.54. See Appendix 2.

142. (1956), 6 D.L.R. (2d.) 326.

143. See *International Association of Heat and Frost Insulators and Asbestos Workers* v. *Mastro Insulators Ltd.* [1964] A.L.R.B. and *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry* v. *Triple L. Investments Ltd.* [1987] A.L.R.B.R. 598 for a recent example of the operation of this section.

144. Labour Act S.A. 1968, c.51.

145. See McKelvey "The Appropriateness of the Injunction in Labour Disputes" (1986) U.N.B.L.J. 114 and Teed "The Ex Parte Injunction Use and Abuse" (1968) U.N.B.L.J. 118.

146. Report of the Royal Commission Inquiry into Labour Disputes 1968 and the Report of the Task Force on LAbour Relations 1968.

147. Royal Commission on Trade Unions and Employers' Associations cmnd. 3623.

148. Ibid. Para. 605 and 627.

149. Armstrong "Task Force on Industrial Relations - Picketing" (1970) 8, O.H.L.J. 471 and Sanderson at p. 479.

150. R.S.A. 1970, c.196.

151. Ibid. s.3.

152. S.A. 1970, c.44.

153. Public Service Act S.A. 1906, c.4.

154. S.A. 1977, c.40.

155. S.A. 1970, c.63, s.52.

156. See the fate of the pickets in Alberta Wheat Pool and Federal Grain Ltd. v. Butler (1970) 75, W.W.R. 652 where non trade union demonstrators were held to be intimidatory.

157. S.A. 1970, c.63, s.53.

158. S.A. 1973, c.33, s.156.

159. From address of R. Basken, President of the Alberta Federation of Labour to the 17th Convention of the Federation in 1973. Reported in (1973) 73, Lab. Gaz. 533.

160. [1973] 1, W.W.R. 766.

161. [1978] A.U.D. 221.

162. 73, C.L.L.C. 14, 179.

163. R.S.B.C. 1960, c.384, s.3.

164. Supra n. 162 at p. 134.

165. S.C. 1960, c.44. See Appendix 2.

166. Supra n. 162 at p. 134.

167. Reference Re Alberta Statutes (1938) S.C.R. 100; Samur v. City of Quebec (1953) 2 S.C.R. 329, Switzman v. Elding (1957) S.C.R. 285.

168. See Finkelstein, Laskin's Canadian Constitutional Law (1986) 5th ed., vol. 2 at p. 992.

169. [1974] 3 W.W.R. 481.

170. [1952] 2 All E.R. 361.

171. (1956), 6 D.L.R. (2d) 326.

172. Supra n. 169 at p. 486.

173. [1960] S.C.R. 265.

174. Supra n. 169 at p. 502.

175. Supra n. 169 at p. 504.

176. [1874], 3 W.W.R. 481 at p. 489.

177. Ibid. at p. 490-91.

178. Supra n. 176 at p. 490.

179. Supra n. 176 at p. 494.

180. Polsuns v. Toronto Stock Exchange (1964), 46 D.L.R. (2d) 210. See ch. 4 II(b).

181. Supra n. 176 at p. 496.

182. The Human Rights Act S.A. 1966, c.39.

183. The Alberta Bill of Rights S.A. 1972, c.1. See Appendix 2 for text.

184. S.C. 1960, c.44.

185. See e.g. Robertson v. Rosetanni [1963] S.C.R. 651.

186. R v. Drybones [1970] S.C.R. 282.

187. [1965] S.C.R. 195 - on appeal from the Appellate Division of the Supreme Court of Alberta.

188. (9160) 31, W.W.R. 322.

189. See the reprimand given by the House of Lords to the Court of Appeal in Duport Steels Ltd. v. Sirs [1980] 1 All E.R. 529 when their

Lordships considered that the appeal court judges had substituted their discretion for that of the trial judge.

190. [1943] 4, D.L.R. 441 at p. 462.

191. (1970), 75 W.W.R. 652.

192. Ibid. at p. 659.

193. Ibid.

194. [1974], 3. W.W.R. 481.

195. [1975], 1 All E.R. 504.

196. (1976), 57 D.L.R. (3d.) 609.

197. Bank of Montreal v. Callbox Properties Ltd. and Baxter Estates Ltd. (1977) 4, A.R. 483.

198. S.A. 1960 c.53, s.2.

199. (1965) 51 D.L.R. (2d) 667.

200. S.A. 1970, c.63, s.51.

201. See e.g. Bennett and White v. Van Reeder [1957] 6, D.L.R. 326.

202. See K.P. Swan "The Labour Injunction in Alberta" (9170) 9 A.L.R. 1.

203. Ibid. at p. 21.

204. S.C. 1876, c.37.

205. 1875 (U.K.) 38 and 39 Vict. c.86.

206. Supra n. 204, s.2.

207. S.C. 1892, c.29.

208. See discussion of origins of Code in A.W. Mewett "The Criminal law 1867-1967" (1967) 45, C.B.R. 726. The Code was also based on Stephens' 'Digest of the Criminal Law' (1887), Burbidge 'Digest of the Canadian Criminal Law' (1889) and Canadian statutory law.

209. 6 Edw. VII, c.47.

210. S.C. 1934, c.47, s.12.

211. [1899] 1 Ch. 255.

212. (1906) 22, T.L.R. 327.

213. [1925] 4, D.L.R. 247.

214. [1899] 1 Ch. 255 at 266.

215. [1926] A.L.R. 81.

216. [1926] S.C.R. 499.

217. See Laskin "Picketing: A Comparison of Certain Canadian and American Doctrines" (1937) 15, C.B.R. 10, where the author argues that Canadian courts should accept the policy changes of the 1906 Act. See also J. Finkelman "The Law of Picketing in Canada" (1933-35) 2, U. of T.L.J. 67, 344.

218. Conspiracy and Protection of Property Act 1875 (U.K.) 38 and 38 Vict. c.86, s.7.

219. Trade Disputes Act 1906 (U.K.) 6 Edw. VII, c.47, s.2.

220. [1931] 55, C.C.C. 318.

221. Ibid. at p. 319.

222. See R. Mckay "Peaceful Picketing and the Criminal Code" (1963) Curr. Law and Soc. Probs 114 where the author argues that all picketing which is tortious is not necessarily criminal too.

223. [1946] 86, C.C.C. 247.

224. (1909) 18 Man.L.R. 471.

225. Ibid. at p. 491.

226. (1911) 21, Man.L.R. 473.

227. [1927] 2, D.L.R. 20.

228. [1926] S.C.R. 499.

229. [1937] 4, D.L.R. 162.

230. Ibid. at p. 172.

231. Supra n. 219.

232. [1940] 4, D.L.R. 725.

233. Ibid. at p. 733.

234. [1951] 3, D.L.R. 769.

235. Ibid. at 789-90.

236. R.S.B.C. 1948, c.155.

237. Supra n. 234 at p. 791.

238. Supra n. 234 at p. 791.

239. See Carrothers "Recent Developments in the Tort Law of Picketing" (1957) 53, C.B.R. 1005, Palmer "The Short Unhappy Life of the Aristocratic Doctrine" (1959-60). U. of T.L.J. 166.

240. [1955] 4, D.L.R. 255 at p. 264.

241. E.g. Macdonald J.A. and Macdonald C.J.A. in Schuberg v. Local International Alliance Theatrical Stage Employees [1927] 2, D.L.R. 20.

242. E.g. Martin J.A. ibid.

243. See e.g. Cotter v. Osborne (1909) 18 Man.L.R. 471.

244. [1926] S.C.R. 499.

245. [1899] 1 Ch. 255.

246. (1906) 22, T.L.R. 327.

247. R.S.C. 1970, c.C-34, s.64. See Appendix 2.

248. R.S.C. 1970, c.C-34, s.65. See Appendix 2.

249. R.S.C. 1970, c.C-34, s.31. See Appendix 2.

250. R.S.C. 1970, c.C-34.

251. S.C. 1892, c.29, s.489.

252. S.C. 1892, c.29, s.493.

253. S.C. 1892, c.29, s.499.

254. (1983), 9 C.C.C. (3d) 85.

255. S.C. 1892, c.29, s.79.

256. (1931), 55 C.C.C. 380.

257. (1931), 57 C.C.C. 81.

258. (1971), 2 C.C.C. (2d) 514.

259. R v. Graham (1888), 16 Cox C.C. 420.

260. R.S.C. 1970, c.C-34, s.65.

261. This was the case in R v. Thomas supra n. 258.

262. (1947), 3 C.R. 508.

263. Cf. R v. Golden (1937) 67 C.C.C. 292 where the B.C.C.A. upheld a conviction against a flower seller for obstruction.

264. (1973), 21 C.R.N.S. 344.

265. R.S.A. 1970, c.85, s.3. Now see R.S.A. 1980 c.P-12, s.31.

266. (1974), 27 C.C.C. (2d) 491 (Ont. Prov. Ct.)

267. [1960] 3 All E.R. 660.

268. See Crankshaws' Criminal Law of Canada Vol. 3, p. 9.8-9.11.

269. For a detailed account of the history of section 171 see D.G. Price "Causing a disturbance" 1977-78, 20 Cr.L.Q. 68.

270. S.C. 1869, c.28.

271. S.C. 1892, c.29, s.207.

272. S.C. 1892, c.29, s.90.

273. S.C. 1947, c.55, s.3.

274. S.C. 1975, c.93, s.9. See Appendix 2. See Poole v. Tomlinson (1957), 118 C.C.C. 384, R. ex. rel Murray v. Murray (1958), 123 C.C.C. 20.

275. (1969), 9 C.R.N.S. 225.

276. (1971), 14 C.R.N.S. 179.

277. Ibid. at p. 183.

278. This view of the meaning of "disturbance" originated in R. ex. rel. Murray v. Murray (1958), 123 C.C.C. 20. It has been suggested by D.G. Price (supra n. 269) that the judge in Murray reached the conclusion that there had to be a separate disturbance after considering cases involving breaches of the peace which did not really apply to finding a disturbance within s.171. There was already authority that the prohibited act in section 171 was itself the disturbance. See Poole v. Tomlinson (1957), 118 C.C.C. 384, R v. Knowles (1929), 52 C.C.C. 377.

279. (1973), 22 C.R.N.S. 326.

280. (1978), 3 C.R. (3d) 165.

281. Ibid. This is also the view in line with previous authority supra n. 278.

CHAPTER 5 - ALBERTA LEGISLATION AND CASE LAW 1980-7

I Introduction

As was shown in Chapter 4 the collective bargaining regime in Canada is one that is imposed by statute. Employment within the provinces is generally a matter within provincial jurisdiction.[1] Each province has its own collective bargaining statute. The terms of the statutes do vary from province to province but there is a common theme to the statutes. As was pointed out in the previous chapter, with regard to industrial disputes, a strike can only be taken by workers in certain circumstances and after certain procedures have been complied with. In Alberta a strike cannot be taken during the life of a collective agreement.[2] Before workers can go on strike there must be a majority vote in favour of striking[3] and notice must be given to the employers[4] of the workers engaged in the strike. Persuasive picketing is only legal if carried out during a legal strike.[5] The conduct of those who picket otherwise than in a trade dispute is judged by the civil law of nuisance or the criminal law.

The Labour Relations Board has the power to hear matters referred to it by employers and unions arising out of the operation of the Labour Relations Act.[6] With regard to striking and picketing the Board has the power to issue a cease and desist order which is similar to an injunction issued by the courts. However decisions of the Board can be the subject of judicial review by the courts and the Board does not have exclusive jurisdiction in matters arising out of industrial disputes. Employers and trade unions therefore have a choice as to the forum in which they make their complaint.

In the last ten years the Labour Relations Board has recorded more of its decisions. It is therefore possible to compare the approach taken by the Labour Relations Board with that of the courts when dealing with cases involving industrial disputes.

With regard to the granting of injunctions in labour dispute cases the courts did adopt the reasoning of the House of Lords in American Cynamid v. Ethicon.[7] As will be shown, in the case of International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Pacific Western Airlines,[8] the Alberta Court of Appeal took the ruling in American Cynamid even further.

A new element has been added to Canadian law in the 1980s by the Charter of Rights and Freedoms.[9] Two judgments have been given by the Supreme Court of Canada which are of relevance to this paper. One involved the legal status of picketing[10] and the other decision involved provincial legislation that removes the right to strike from certain employees.[11]

Before considering the nature of the modern day statutory scheme in Alberta an important case heard by the Supreme Court of Canada in relation to conspiracy will be discussed.

(1) Conspiracy to Use Unlawful Means

The Supreme Court of Canada gave judgment in an important case in 1983 relating to conspiracy to use unlawful means. Canada Cement LaFarge v. B.C. Lightweight Aggregate Ltd.[12] can be compared to the British case of Lonrho Ltd. v. Shell Petroleum.[13] In the latter case the House of Lords declined to extend the tort of conspiracy to the situation where the defendants had acted unlawfully in that they had breached a penal statute and had thereby injured the plaintiff.

In Canada Cement LaFarge the plaintiffs had been convicted of offences under the Combines Investigation Act[14] in relation to their business dealings with the defendant. The defendant, who had gone out of business, alleged that the breach of the penal statute was evidence of unlawful means used by the plaintiffs and the plaintiffs were therefore liable for conspiracy to use unlawful means. Estey J. gave judgment for the Court and held that the defendants would only be liable if their conduct was directed towards the plaintiff and the defendants knew that in the circumstances injury to the plaintiff was likely to and did result. In this case there was no evidence to support the allegation.

Estey J. does not therefore categorically state that breach of a penal state cannot supply the unlawful means for conspiracy; however, he cites the statement of Lord Diplock in the House of Lords to that effect.[15] It might be said that the reasoning posed by Estey J. is but another form of conspiracy to injure, but he distinguished the latter form of conspiracy by stating that in relation to conspiracy to use unlawful means there must be constructive intent,[16] "derived from the fact that the defendants should have known that injury to the plaintiff would ensue." For conspiracy to injure it is necessary to show that the predominant purpose of the defendants is to injure the plaintiffs. The result is that in Canada conspiracy to use unlawful means can in some circumstances be based on breach of a penal statute whereas in Britain it cannot.

The importance of the Canada Cement LaFarge to labour relations is that tortious actions can be based on breach of a labour relations statute. Estey J. considers the cases of Gagnon v. Foundation Maritime[17] and Southam Co. v. Gouthro[18] and finds that in both cases constructive intent to injure the plaintiffs was found. Constructive intent is in fact much easier for the courts to find than predominant purpose. The court merely has to make a value judgment after hearing the evidence whereas the evidence must actually support a finding of predominant purpose. In Canada therefore conspiracy to use unlawful means will continue to be available as a course of action to plaintiffs in labour law cases.

II The Alberta Labour Relations Act[19]

(1) Employees excluded from the operation of the statute

Following amendments to the Labour Act in 1974[20] and 1977,[21] the whole scheme of the statutory provisions were revised in 1980. The present Labour Relations Act[22] like its predecessors, only permits industrial action to take place at given times and in given circumstances and most particularly not during the life of a collective agreement.[23] Mediation or binding arbitration are voluntary except in the case of firefighters and hospital employees who are subject to compulsory arbitration and who do not have a right to strike.[24]

Hospital employees were added to the groups of workers forced by the legislation to use mediation or arbitration in 1983. The Labour Relations Act does not apply to those employees in public service and covered by the Public Service Employee Relations Act,[25] police officers of a municipal police force and covered under the Police Act,[26] farm employees, employees in domestic service and any other employee to whom the Labour Relations Act does not apply because of a provision in another act. Also excluded are employees who exercise managerial functions, are employed in a confidential capacity or who have access to matters relating to labour relations and people who are members of the medical, dental, architectural, engineering or legal professions, who are qualified in Alberta and employed in their professional capacity.[27] Further, other employees have in fact been held not to be employees under the Act, because they have been held to be self-employed.[28]

In all 11.7% of paid non-agricultural workers do not have the right to strike in Alberta.[29] In AUPE v. Attorney General of Alberta[30] the Provincial Government put forward two reasons for depriving from employees such as policemen, hospital employees and public service employees, the right to strike. These reasons were the protection of essential services and the protection of government from political pressure through strike action. The AUPE case will be considered further in this chapter in relation to the arguments made concerning the Charter. However further examination of the rationale for excluding the right to strike is suitable at this point.

With regard to the preservation of essential services, firemen and the police can perhaps be placed in a different category to such widely defined groups as hospital employees and public service employees. There is some justification for excluding the right to strike when there is concern for the safety of the community at large, as there might be if police and firefighters were not on duty. It should be pointed out however that many unions in what are regarded as essential services will maintain emergency cover during a strike. It is accepted however that emergency cover might not be adequate in the case of policing, as emergencies would be difficult to define in advance.

Where the right to strike is denied to employees then the mediation and arbitration provisions must be adequate. A detailed discussion of arbitration and mediation procedures is outside the scope of this study, but in this respect it is interesting to note the comments of the Chief Justice of the Supreme Court of Canada. In his dissent on the issue of whether the right to strike should be denied to police and firefighters in Alberta he noted[31] that under the Public Service Act[32] and the Police Officers[33] Act certain fundamental items were not arbitrable. Further, the fact of going to arbitration was not a right given to employees. It was up to a Minister or an administrative board to determine when and if the arbitration process should begin.[34] The Chief Justice concluded that the absence of the right to strike had not been adequately compensated for by these provisions.

With regard to hospital employees and public service employees, the terms of the legislation are defined very widely. Hospital employees is a term which includes everyone who works in a hospital from the kitchen, laundry, and janitorial sections upward. The Public Service Act includes all those employed by the Crown in right of Alberta and employed by corporations, commissions or boards appointed by different functions of government. To state that all the people thus employed are carrying out essential services is dramatically overstating the importance of the functions of each employee.

The second rationale for excluding the right to strike from certain groups is that their employer, the government, should not be subject to political pressure. The second rationale has an authoritative ring to it but raises the question as to whether the rationale is justified. Is the government as an employer really in any different position from any other employer? Disputes outside of government employment often inconvenience the public or disrupt services but the right to strike is not denied to other employees on the basis that the strike is a political act.

Further, strikes that occur outside government employment often indirectly put pressure on the government. For example strikes that occur in dockyards can create a situation of national emergency if they are prolonged. The political pressure on the government to intervene in such a dispute would be no less extreme than political pressure created by their own employees going on strike. Yet it would be difficult for the government to justify a prohibition on strikes by dockworkers on the grounds of political pressure. A closer examination of the second rationale therefore reveals that the reasoning behind it is not necessarily as sound as it should be to justify denying the right to strike to a large percentage of the population.

(2) Section 114 of the Labour Relations Act

The picketing provision in the Alberta Labour Relations Act is now section 114 and is in substantially the same form as it was in 1970.

> S. 114(1) When there is a strike or lockout that is permitted under this act, a trade union, members of which are on strike or locked out, and anyone authorized by the trade union may, at the striking or locked out employees' place of employment and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to
>
> (a) enter the employers' place of business operation or employment,
> (b) deal in or handle the products of the employer, or
> (c) do business with the employer.
>
> (2) except as provided in subsection (1), no trade union or person shall persuade or endeavour to persuade anyone not to
>
> (a) enter an employer's place of business operation or employment,
> (b) deal in or handle the products of any person,
> (c) do business with any person.

Section 114 thus clearly outlaws secondary picketing and as was indicated in the previous chapter, there is a strong argument to be made that the section makes everything but information picketing illegal. The words "without acts that are otherwise unlawful" govern the section and it can be argued that all effective persuasive picketing involves an unlawful act. The most obvious unlawful act is the tort of inducing breach of contract. Even if pickets do not succeed in preventing anyone from crossing the picket line, their actions may still be judged to be unlawful. The pickets may be committing criminal offences such as obstruction of the highway or may be found to be unlawful per se as a mass picket and a nuisance.

The courts however have not interpreted section 114 so as to make all picketing unlawful. In Edinburgh Developers[35] it was held that causing a breach of section 114(2) was an act that was otherwise unlawful. Picketing that was ostensibly peaceful was enjoined on that basis. In the same case Allen J.A. hinted that acts of a violent nature would be unlawful.[36] As will be shown in this chapter there are by comparison picketing cases where the courts have held picketing activity to be within section 114, even though effective persuasive picketing must involve the tort of inducing breach of contract and therefore be "otherwise unlawful."

Another important feature of section 114 is that picketing can only be carried out where there is a lawful strike or lockout under the provisions of the Labour Relations Act. Picketing in support of a strike contrary to the provisions of the act would therefore be illegal. Thus if employees did not have the right to strike and did so, any picketing to support the strike would be illegal. It was also held in Edinburgh Developers v. Vanderlaan[37] that picketing which provoked an illegal strike was contrary to section 114. When workers not party to the dispute would not cross the picket line, it was held that they were in effect taking part in an illegal strike. In the fact situation of a multi-employer site, picketing activity was thus severely curtailed by the operation of section 114.

With regard to the location of picketing, section 114 is expressed in terms of "the employees' place of employment", and this has been held to include places where employees may be sent to work.[38] The exact ambit of the phrase "employees' place of employment" may require further definition, depending on the facts of a subsequent case. In Britain the terms of the statute are now more specific in that the new section 15 of the Trade Union and Labour Relations Act (T.U.L.R.A.)[39] provides that the proper location to picket is the premises of the employer from which the picket works or from which his work is administered. The case law in Alberta has therefore gone one step further in allowing employees such as elevator maintenance men to picket at situations where they are sent to work. In Britain, such employees would have to picket at the company's head office.

As stated above section 114 makes no allowance for any form of secondary picketing. The terms of the statute are quite clear in this respect, as are the terms of the new section 15 of T.U.L.R.A. in Britain. Section 15 also does not allow for any form of secondary picketing. The

Alberta Labour Relations Act contains a provision with regard to other forms of secondary action. Section 140 makes it an unfair labour practice to refuse to work in the following situations.

> 140 No employee shall
> (a) refuse to perform work for his employer for the reason that other work was or will be performed or was not or will not be performed by any person or class of persons who were or are not members of a trade union or a particular trade union, or
>
> (b) refuse to take delivery of goods from a carrier or refuse to assist the carrier in the loading of goods for shipment except where the carrier and his employees are engaged in a strike or lockout permitted by this Act.

Secondary action is therefore only permitted in the situation of supply and delivery of goods where the carriers' employees are engaged in a legal strike or lockout.[40] Section 140 may be compared with section 17 of the Employment Act 1980 in Britain.[41] Section 17 is far more complex in its terms than section 140 and does allow secondary action in certain narrowly defined circumstances. Secondary action is therefore permitted against an employer who has direct contractual relations with the primary employer and against an associated employer of the primary employer to whom production has been switched because of the dispute. In both of the above cases the secondary action must be in order to and likely to disrupt supplies to or from the primary employer. Secondary action is also permitted where it is in accordance with section 15 of TULRA.

As section 17 is so complex it is not easy to evaluate its effect and thus compare whether the terms would allow secondary action in more circumstances than would section 140 of the Alberta Labour Act. On a simple comparison of the words of each section, section 17 does appear to be wider. However, an evaluation of section 17 does require an objective analysis by the court as to whether the secondary action was likely to disrupt the supply of goods. It is therefore not possible to be sure in advance exactly what action section 17 will protect, except when it is picketing in accordance with section 15 of TULRA. In terms of who may be persuaded the British statute is clearly wider. This aspect will be considered in section III(c) below.

In Alberta it has been made clear by the Court of Appeal that even when picketing your own place of work seemingly within the statute, unlawful secondary action can still be committed. In Edinburgh Developers v. Vanderlaan[42] employees were in dispute with two employers on a job-site. They picketed the site in support of the dispute. Employees not connected with the dispute refused to cross the picket lines. It was held that the rights of the strikers to lawfully picket within section 114(1) were subject to the rights of other employers in section 114(2) not to have picketing carried on at their place of business. As pointed out above, such secondary action in Britain would now be protected by section 15 of the Trade Union and Labour Relations Act 1974.

The next sections will consider how the Alberta courts and Alberta Labour Relations Board have dealt with picketing in the 1980s.

(3) Interpretation of the Labour Relations Act

(a) The Courts

In interpreting section 114 of the Labour Relations Act the Alberta courts have concentrated on two issues - the location of picketing and the number of pickets. A third issue is the judicial procedure by which the orders to limit picketing are made. This section will look at these three issues in turn. Finally the contempt powers of the court will be considered.

(i) Location of Picketing

In Calgary v. Calgary Civic Employees[43] Brennan J. had to consider the various locations where civic employees were picketing in relation to the fact that section 114 requires picketing to take place at the striking employee's place of employment.

Brennan J. held that the fact that a union member watered plants in various municipal buildings for one and a half days a week, was sufficient for the buildings to constitute a place of employment of a union member and thus the union could picket these buildings. However, the same could not be said of public areas such as manholes, where independent contractors had been hired to do repairs in place of union members. The test that seems to be indicated is one of regularity of attendance. Brennan J. declined to decide whether pickets were trespassing on a private roadway belonging to the City. Instead he placed more emphasis on the provisions of section 114, recognizing that if he were to bar the picketing it would circumvent the provisions of the section.[44]

> If on an application of this nature I were to restrain the members of the Union from positioning themselves on this private property, it could result in them having to do their picketing as much I suppose as a mile or maybe a half mile away from the actual place of employment and such picketing would then serve no purpose; and in particular, would not serve the purpose which has been declared by the Act to be lawful.

It appears to be implicit in Brennan J.'s description of the facts of the case that the roadway in question was in fact the private property of the City. However it is arguable that all roadways belonging to a City are public property so that the issue of trespass in relation to pickets should not arise. If the roadway was only private it is of note that there is no mention of the Supreme Court of Canada decision in Harrison v. Carswell.[45] In that case it was held that a shopping mall owner could maintain an action for trespass against an employee of a tenant of the mall. The employee was exercising her right to picket peacefully at the premises of her employer in the mall. More important perhaps than the omission of discussion on Harrison v. Caldwell[46], was the fact that i n the City of Calgary case Brennan J. was prepared to recognize what the effect of an injunction would be if he restricted the pickets from attending on the roadway.

It is interesting that in the City of Calgary case the plaintiffs do not appear to have alleged that a tort other than trespass on the roadway had occurred. Brennan J. elected to decide the case solely on the basis of the terms of the Act and refused to make a decision on the issue of trespass. This approach was quite contrary to the practice of judges in other cases where torts were still used as a basis upon which to find liability for a breach of the labour relations statute.[47] The reason that the economic torts are still used is that it is not clear that individuals can maintain an action for breach of a statute which has penal provisions as does the Labour Relations Act for illegal strikes and picketing.[48] It is now settled law in Alberta that the Attorney-General can obtain an interlocutory injunction to enforce legislation, even where there are penal provisions in the legislation.[49] It is by no means clear that a private individual can do the same and the torts therefore continue to be used. In the absence of express statutory direction this will continue to be the case. Also, if a plaintiff took action against a defendant for simple breach of statute, he would not be able to claim special damage suffered as a result of the industrial action, unless there were express statutory provisions. In the City of Calgary case the municipality may not have been very concerned about recovering damages and indeed may not have even suffered any. There would therefore have been no need to allege a tort such as inducing breach of contract.

(ii) Number of Pickets

The City of Calgary case and the case of Canfarge v. Tunney[50] discussed in the last chapter would generally appear to be favourable decisions as far as unions were concerned because they allowed picketing to continue. However the cases must also be viewed in terms of the final orders made by the courts. Although the picketing may have been allowed, it was, restricted to a given number of pickets at given locations. In the City of Calgary case, pickets were restricted to three at each entrance, in Canfarge v. Tunney,[51] to two at the company offices. The inference seems to be, in the absence of any guidelines such as the Code of Practice for Picketing[52] which exists in Britain, that lawful picketing can only be practiced in small numbers. In each case the numbers are quite small, so that the value of being able to continue picketing in this fashion is minimal. As in England, pickets do not have the right to stop vehicles so that a very small group at the entrance to a factory would have little or no effect.

What is lacking in the judgments is a sufficient justification for dramatically limiting the numbers of pickets in the absence of any legislative guidelines. Neither of the above mentioned cases involved mass picketing so that there were not sufficient people to constitute a nuisance. A picket line of two or three would be no more or less effective than a picket line of five in inducing other employees to breach their contracts. In the absence of violence or damage to property there would appear to be no good reason for the reduction of numbers of pickets.

An opportunity to pronounce on the validity or otherwise of mass picketing was presented to the Alberta courts in the case of International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Pacific Western Airlines Ltd.[53] The union was engaged in a lawful strike against the airline. The strike was actually governed by the Canada Labour Code as airlines came within federal jurisdiction. The Federal Labour Code contains no provisions in relation to picketing.

In pursuance of the dispute the union set up picket lines at Calgary airport, both inside and outside the terminal building. The original application for the injunction in this case had included allegations of violence. The injunction granted by the trial judge had limited the number of pickets at the various entrances to the airport to numbers varying between twelve and two. The issue before the Court of Appeal was the ability of the court to limit the number of pickets. The Court of Appeal held that large numbers of pickets could in itself be unlawful:[54]

> In my view the numbers of pickets on 6th December and 5th December did amount to unlawful picketing. Sheer numbers can of itself obstruct access or even deny it. Sheer numbers of picketers, far beyond that which is necessary to disseminate information, can intimidate by their exuberance and their numbers. In this case the numbers were such as to give rise to the inference that members of the public were obstructed from entering or leaving the terminal.

There was however no evidence or firm proof that the public were not using the airline because of the picketing. Such proof would surely not have been difficult to obtain. A comparison could have been made for example of the numbers who bought tickets in the year before at the same time, with the numbers buying tickets during the strike. The Chief Justice actually acknowledged that[55] "whether some members of the public choose not to travel on Pacific Western aircraft and their reasons for doing so is not established". Such a finding however did not prevent him from limiting the numbers of pickets.

To support the proposition that mass picketing was unlawful per se Laycraft C.J.A. referred to two decisions, one in Saskatchewan and one in British Columbia involving the same facts. However, in Saskatchewan,[56] Estey J. had found unlawful conduct in the fact that the pickets were interfering with the plaintiffs' right to carry on its business. He did not make a finding that mass picketing was unlawful per se. In British Columbia, McEachern C.J.S.C. adopted an approach more consistent with statutory provisions which give each individual a right to picket in the absence of unlawful conduct.[57]

> ...I would not limit the lawful right of the members of the defendant union lawfully to communicate their grievance by peaceful gathering at their work place for this purpose. I rely on the good sense of the defendants and their members not to overstate their case either by congregating in excessive numbers or by slipping into unlawful nuisance, violence or intimidation.

The inference from the above statement is that if an order of the court is breached, it may then be appropriate for the court to intervene. McEachern C.J.S.C. makes a clear distinction in his statement between gathering in large numbers and unlawful conduct of nuisance, violence or intimidation. He specifically does not say that mass picketing is unlawful per se. He infers that it is undesirable but this is not the same as unlawful and the statement does not clearly support the proposition of Laycraft C.J.A. that mass picketing is unlawful per se.[58] Despite the fact that the statements of Estey J. and McEachern C.J.S.C. do not support the proposition that mass picketing is unlawful, it was clearly open to Laycraft C.J.A. to independently make this finding. As already stated, the Canada Labour Code does not deal with picketing and the common law could be thus expanded.

In Alberta the clause in section 114 of the Labour Relations Act which only allows picketing without conduct that is otherwise unlawful could be used to enjoin mass picketing if it is held that mass picketing is unlawful per se. It is likely that following the Court of Appeal decision in Pacific Western Airlines, mass picketing would be found to be unlawful in Alberta.

During 1986, a number of bitter labour disputes occurred in Alberta, which, in the words of a member of the Labour Relations Board, gave such disputes[59] "...an unusually high public profile, and perhaps raised feelings on either side to heights that might otherwise not have been encountered". One legal strike which occurred involved employees at the Gainers' meat packing plant.

The collective agreement at the plant came to an end on the same day the strike began in the face of disagreement on wage provisions. Under Alberta law, those on strike are still employees;[60] but the law does not prohibit an employer from using strike breakers to continue his business.[61] In this particular case the situation was heightened by the fact that the employer had advertised for replacement workers two weeks before the strike had begun, thus contributing to suspicions by the strikers that the real intention was to discontinue relations with the union.[62]

On the second day of the strike an interim injunction was issued[63] by Agrios J. in Gainers Inc. v. United Food and Commercial Workers Union which restricted the number of pickets to 42, who were to be divided between three entry gates. As well as limiting the numbers, the pickets were limited by distance from the gates to 10 feet and 20 feet. The order continued by prohibiting the permitted pickets from unlawfully interfering with the plaintiff's operations, intimidating, threatening, persistently following, harassing and obstructing the plaintiff's employees or any person dealing with the plaintiff and obstructing the exit and entrance of the plant.

After some fairly violent clashes between police and pickets an amendment to the order in the Gainers case was made by Cavanagh J.,[64] eight days later. The new order prohibited all picketing except by six people who were to be not closer than 15 feet to each of the three entry gates. Twelve pickets were also permitted no closer than 60 feet to the perimeter fences. The union was directed to keep a register open to police inspection of those authorized to picket and a designated area near to the plant was declared a prohibited zone for congregation, that is, not more than three people could stop there at any one time.

The fact of the police register immediately raised a question as to the status of those who were not employees on strike and who wished to visit the picket line. Such people might include lawyers, reporters and general supporters. Various interest groups immediately sought to have this order varied[85] on the basis that it was contrary to the legislation to allow only those authorized by the union to picket. Cavanagh J. rejected the proposition that persons other than those lawfully on strike could picket by saying that section 114 clearly did not permit such conduct. However, the applicants were successful in having retracted the prohibition from the buffer zone of all people other than the union defendants.[86]

> It is clear that in creating a prohibited zone applicable to all citizens I extended the law which I had no authority to do.

The requirement of the police register was therefore presumably still valid with regard to those picketing at the entrances to the plant. The police were thus drawn into administering the picket line rather than simply policing it.

It was submitted in the introduction to this thesis that effective picketing cannot take place unless persuasion is permitted of others not to cross the picket line. As long as the tort of inducing breach of contract is available persuasion that succeeds in turning back people from the picket line will be enjoined. Often picket lines are operated with the co-operation of the police and pickets are permitted to spend a short time talking to each person going into the employer's premises. In Alberta Liquor Control Board v. Alberta Union of Provincial Employees[87] Feehan J., sanctioned this practice. The injunction order specifically omitted the paragraph requested by the plaintiff solicitors which prohibited pickets to do anything that would have the effect of procuring or inducing a breach of contract.

However in Canada Post Corporation v. The Letter Carriers' Union of Canada[68], Matheson J., declined to adhere to the requests made by affidavits of members of the defendant union. The affidavits stated that the picket line was orderly and persuasion had been carried out with the co-operation of the police. The order prohibited pickets from interfering with the plaintiff's operations, intimidating and harassing persons dealing with the employer and blocking entrances to the employer's premises. Picketing was permitted in groups of five only.

It can be seen from the above cases that the Alberta courts will enjoin mass picketing on the basis that it is unlawful per se. By reducing the numbers on a picket line and prohibiting pickets from standing in certain areas, the courts can drastically reduce the effect of the picketing. There is also Supreme Court authority which goes even further than the Pacific Western Airlines case or the Gainers case. In those two cases it could be argued that there was at least some justification for the imposition of the injunctions because the public might not have been able to hear the public address system in the Pacific Western Airlines case and because of the violence involved in the Gainers case. In International Longshoremen's Association v. Maritime Employer's Association[69] Estey J. in the Supreme Court of Canada took judicial notice of the fact that a picket line was a commonly understood signal to other employees not to cross the picket line. It was therefore understood that an illegal strike would be caused as a result and this was reason enough to enjoin a picket line.

(iii) Judicial Procedure

There are two matters to consider under the heading judicial procedure. The first is the practical way in which Alberta judges deal with applications for interlocutory orders. The second matter is the substantive law that the judges apply in deciding whether or not to make an interlocutory order.

One of the features of the Gainers litigation was the apparent ease by which an applicant could go back to court after a first order and have this amended by a different judge who might have a different viewpoint on the matter. This feature was more pronounced in the case of Zeidler Forest Industries Ltd. v. International Woodworkers of America.[70]

The latter case was also a legal strike situation and the first order by Cavanagh J. as well as prohibiting a number of tortious acts provided that only eight pickets could demonstrate at the sawmill, 20 feet from the two entrances. A further order by Hutchinson J.[71] provided that others of the union could not attend within a half mile of the mill except to work or to use the road for lawful transport. The union trailer was to be moved from a site near the sawmill to a position half a mile from the gates and the police were to be allowed to inspect union property.

The case was further considered by Feehan J.[72] who accepted the affidavit evidence of the plaintiffs concerning conduct by certain named individuals and prohibited them from picketing at all. There is no doubt that the Zeidler Forest case has involved many episodes of violence on the picket line. The violence has included damage to property and it is not suggested that the injunctive process should not be used in those circumstances. However, the violence does not preclude a judge from giving reasons for a detailed order albeit at a later date if the need for the order is urgent. In the Zeidler Forest case the interlocutory orders have not disposed of the matter, but in many labour disputes interlocutory orders will ensure the matter never gets to trial. When such an important issue is at stake it is suggested that written reasons should be given. British judges will also issue interlocutory orders without giving written reasons. However in two cases, Thomas v. NUM[73] and News Group Newspapers Ltd. v. SOGAT'82,[74] written reasons for interlocutory orders were given. The written reasons in both cases ran to many pages[75] and if nothing else showed the reasoning of the judges in making their decisions.

It is also desirable for a judge to reserve a case to himself wherever possible. This will ensure greater continuity when subsequent orders are given and enable a judge to become more familiar with the matter. It is inevitable that different judges will hold different viewpoints as to the limits of permissable conduct on a picket line and it is therefore preferable if the same judge deals with the case throughout.

Turning to the substantive law applied by the judges in deciding whether or not to grant an interlocutory injunction, section 112 is now the relevant section of the 1980 Labour Relations Act. Section 112 is in essentially the same form as section 27 of the 1968 Labour Act[76] and endeavours to safeguard the defendants' position from abuses of process in an application for an interlocutory injunction. Ex-parte injunctions are prohibited in matters connected with a strike or lockout, and affidavits are to be confined to facts that deponents could prove from their own knowledge. A minimum limit of four hours notice is to be given before the hearing of an injunction.

Although the section deals with the procedural rules, it does not provide for any special matters to be considered by judges when granting interlocutory injunctions in labour dispute cases. In Britain a special section was added to T.U.L.R.A. in 1975[77] to direct judges, to some extent, to consider the merits of the case before granting an injunction. The new section was in response to the law made by the House of Lords in American Cynamid v. Ethicon[78] that in considering an application for an interlocutory injunction, the plaintiff only had to establish that there was a serious issue to be tried. Once this was established matters such as the balance of convenience could be considered.

American Cynamid had already been followed in one non trade dispute case in Alberta[79] prior to 1980. In another non trade dispute case, Ominayak v. Noreen Energy[80] the Court of Appeal confirmed a tripartite sequential test.[81]

> First one must establish that the cause of action is not frivolous; next one must establish that there would be no fair and reasonable redress available if there were no interim relief; third, the balance of convenience, having regard to all relevant factors, must favour an injunction.

The test, as enunciated in the Alberta Court of Appeal was certainly clearer in its terms than that enunciated by Lord Diplock in American Cynamid. However, the Alberta test clearly followed the House of Lords format in that the plaintiff had only to establish that there was a serous issue to be tried and then the court was to consider the balance of convenience which included the possibility of irreparable damage.

It remained to be seen if the judges would apply the case to a labour dispute. As was pointed out by Lord Diplock in NWL v. Woods[82] there were certain practical realities to take account of in a labour dispute. If an injunction was granted in the midst of an industrial dispute, the effect would often not be to merely maintain the status quo, but to end the dispute and remove the reason for the lawsuit.

An appeal from the granting of an injunction in a labour dispute case came before the Court of Appeal in International Union United Automobile Aerospace and Agricultural Implement Workers of America v. Pacific Western Airlines.[83] The case involved picketing by members of the appellant union at Calgary airport terminal building. The trial judge had granted the injunction on the basis that the plaintiff was suffering irreparable damage.

Counsel for the defendant union appears to have relied on American Cynamid as a reason why the injunction should not have been granted on the basis that the plaintiff suffered irreparable damage.[84] It was alleged by the defendant that the evidence did not show irreparable damage and without such evidence an interim injunction should not be issued. Exactly how American Cynamid supports the above proposition is not made clear. In fact the British case establishes that matters such as irreparable harm are important if in all other respects the parties' cases are equal.

Laycraft C.J.A. considered the nature of an injunction in a labour dispute. Although he does not refer to NWL v. Woods[85] or Lord Diplock's judgment he makes the same acknowledgment of the practical realities of the effect of such an order.[86]

> The Court must be aware that in virtually all cases the injunction in respect of picketing is effectively a final injunction. Rarely do the issues on such "interim" applications ever come before the Court again since they do not survive the settlement of the labour dispute.

However, rather than this factor being a reason to exercise more rather than less caution in granting an injunction, Laycraft C.J.A. goes on to say that where public rights are infringed, irreparable damage does not have to be shown. In the judge's view picket line incidents affected the rights of the public.[87]

> In this particular case they affect the right of citizens to enter or pass peacefully through a public airport. It is not a mere private dispute in the law of contract or tort. In my view the test of

> irreparable damage required to be met to obtain interim relief in a private dispute is not applicable where the rights of third parties are affected.

In effect, Laycraft C.J.A. is replacing the requirement that the plaintiff has to establish irreparable harm with the balance of convenience test. He is thus re-emphasizing the importance of the balance of convenience test much as Lord Diplock did in the NWL case, despite the fact that American Cynamid stated that the balance of convenience was only to be taken into account if in all other respects the parties cases were equal. It may be that the subsequent confusion has arisen because principles that can be applied to patent law cannot easily be translated to deal with problems that arise in labour law. It may be that in connection with a particular patent each party has an apparently equal claim. However in a labour dispute the issues are not clear unless an investigation is made as to the root causes of the dispute. When dealing with an application to order that picketing should be enjoined the judge has no mandate to look to the causes of the dispute and thus applies legal principles that cannot fairly solve the situation before him.

The question as to how far the issue of public policy should be taken into account in a labour dispute is also arguable. It is accepted that there are occasions when, on grounds of public policy, certain picketing activities should be enjoined. The circumstances when an injunction would be necessary should only be when the picketing activity is such as to be dangerous either to pickets or members of the public. An example might be where picketing at an airport was restricting the ability of airport personnel to ensure that planes could take off and land safely. Another circumstance where it might be justified to enjoin picketing on the basis of public policy might be where the public was very severely restricted in exercising its freedom to use public areas. This was not the case in the Pacific Western Case where the evidence of one union official was that the airport passenger traffic was no different in numbers than it had been the year previously. The public might have been inconvenienced but there was no evidence that the picketing activity was so serious that the public was not exercising its freedom to use the airport. Even if the public were being severely restricted from using the airport, that would be a different matter to the plaintiffs having to establish irreparable damage. To restrict the picketing on grounds of public policy should be the subject of a separate allegation by the plaintiffs with supporting evidence. Judicial discretion should be exercised extremely cautiously in the name of public policy.

The test for granting an interlocutory injunction in Alberta since the Pacific Western Airlines case is now very wide. The plaintiff must establish there is a serious cause of action, that there would be no fair and reasonable redress if there were no interim relief and that the balance of convenience favours an injunction. When considering the fact that the plaintiff may be suffering irreparable harm the court will look to see if the interests of third parties are being affected. If they are then the plaintiff does not have to prove irreparable harm. The new test propounded by Laycraft C.J.A. to be used in labour dispute cases is too wide in that it does not define what degree of restriction of the public interest is necessary. Although judges had frequently not insisted on strict proof of irreparable damage in previous cases, the requirement still had to be met by the plaintiff to some extent. Following the Pacific Western Airlines case, plaintiffs will only have to establish that the rights of a third party have been somehow infringed and there will be no requirement to establish irreparable damage. It might have been thought that after American Cynamid the tests for granting interlocutory injunctions could not have been more favourable to plaintiffs in labour dispute cases. The judgment of the Alberta Court of Appeal in Pacific Western Airlines showed that the tests could be made even more favourable for plaintiffs.

(iv) Civil and Criminal Contempt

It was noted in chapter three how increasingly important the procedural aspects of the law had become in industrial dispute cases in Britain in the 1980s. Plaintiffs sue more often for damages suffered as a result of industrial action. The courts are willing to fine the unions vast sums for civil contempt and levy the remedy of sequestration of assets.

The Alberta courts have similar powers of contempt and have used them in labour disputes cases where defendant unions have disobeyed injunction orders. There are however some important differences in the nature of the orders made by the Alberta courts. One example arose out of the strike which occurred at the Gainers meat packing plant in Edmonton in 1986. The strike was legal and involved a dispute over wages. Earlier in this chapter it was explained how a series of civil injunctions restricted the picketing outside the plant in terms of numbers and location.

Examination of the civil injunctions issued illustrates how the police are given added powers to intervene at a picket line. The injunctions charge the police with the duty of enforcing the orders contained therein. For example the penultimate paragraph of the injunction issued by Cavanagh J. on 10th June 1986 provides as follows,[88]

> It is Further Ordered that upon the persons restrained hereby being in breach of any of the terms of the within Order, then, and in such event, any Police Officer of the City of Edmonton Police Department shall forthwith arrest and restrain him and bring him at the earliest possible date, before a Justice of the Court of Queen's Bench to show cause why he should not be committed in contempt.

What happens in practice is that when the police are at the scene of a picket line they can either arrest someone for a Criminal Code offence such as mischief or arrest someone for being in breach of the terms of the injunction. If a person is arrested for breach of the injunction he will be taken before a Queen's Bench judge to speak to his release. Unless a person has been arrested for the same reason a few times he will generally be released.

Initially the motion before the court is to have the person cited in civil contempt.[89] Counsel may then request the court to exercise its inherent jurisdiction to convert the proceedings into summary criminal proceedings.[90] Pending a further appearance for sentencing purposes, the person will usually be released on entering into a recognizance for approximately $500. It is likely that there would also be conditions attached to the recognizance.

Using this power granted under the terms of the injunction the police can therefore effectively reduce the numbers on a picket line without having to provide evidence of any criminal offence. That such a power was widely used in the Gainers strike is evidenced by the fact that out of approximately 400 arrests made under the authority of the injunction, over 350 people were only detained.[91] Those who were released without being convicted for criminal contempt were of course subjected to the police procedures of fingerprinting and being photographed.

In Calgary v. Calgary Civic Employees (No. 2)[92] Steer J. considered the circumstances when a court would decide to hold a defendant guilty of criminal contempt rather than civil contempt.[93]

> In my view, where there is a deliberate flouting of an injunction granted by a court when it is notorious knowledge that the injunction has been granted and people persist in conduct that breaches it, then those persons expose themselves to the danger of one being charged with criminal contempt before the court itself, and I am not referring to the criminal code section, and being found guilty of it.

In that case where a picket had breached the terms of an earlier injunction, Steer J. found only civil contempt because the defendant had no criminal record and had apologized to the court.

Other judges have not shown similar restraint. In the Gainers case the union was fined $12,500 for criminal contempt.[94] As a result of an illegal strike an Alberta nurses union was fined a total of $400,000 for criminal contempt. Individual nurses were fined $250 each for civil contempt.[95] The union was threatened with sequestration of its assets if it did not pay the fines.

Thus it can be seen that financial penalties for unions who do not obey court orders can be just as severe in Alberta as in Britain. The comments of Steer J. as set out above in Calgary v. Calgary Civic Employees (No. 2)[96] with regard to criminal contempt are relevant for pickets. The distinguishing feature of criminal as opposed to civil contempt is that the court is brought into public disrepute by the fact that the terms of the injunction are breached. As discussed above, the police are often specifically charged by the terms of an injunction to arrest those who act in breach of the order. Criminal contempt in such circumstances is thus viewed very seriously by the courts.

As a result of contempt being viewed as such a serious offence, the courts in Alberta have insisted on strict proof of service on a defendant of notice of the injunction before he can held to be in contempt. In Parkland Nursing Homes Ltd. v. Canadian Union of Public Employees[97] Cavanagh J. held that applications in respect of contempt proceedings against thirteen defendants were to be dismissed because it was not sufficient to prove beyond a reasonable doubt that the defendants had been served with notice of the order. The burden of proof called for evidence that the applicant had complied with the requirements of proof of service.[98]

(b) The Labour Relations Board

The Board has jurisdiction under section 142(5) of the Labour Relations Act to issue a directive if satisfied that a provision of the Act has not been complied with. In the case of an illegal strike or picketing this would be in the form of a cease and desist order. An informational bulletin is published regarding the processing of such complaints,[99] which deals only with the procedure for making the complaint and does not give any guidelines as to how particular conduct will be viewed by the Board.

The Board decisions can also be divided into groups dealing with certain issues relating to section 114. As with the courts one of these issues is the location of pickets. The location of pickets also involves a consideration of the relationship between section 114(1) and section 114(2). Other cases have dealt with matters of procedure and proof where a breach of section 114 is alleged. First, a case will be considered of picketing which was not in pursuance of a legal strike.

(i) Picketing Within Section 114(2)

In Pacal Blades of Canada Ltd. v. United Steelworkers of America[100] employees who had been dismissed were picketing the premises of their former employer. The picketing was peaceful, but there was evidence that one truck driver had been persuaded by the demonstrators not to enter the company gates. The Board studied section 114 and found that section 114(1) set out what could be done during a legal strike and section 114(2) prohibited the same acts if done in pursuance of an illegal strike.

It is accepted by all parties in the case that the employees were not taking part in a lawful strike because the procedures precedent to a legal strike laid down in the Act had not been complied with. The question then for the Board to decide was whether the pickets had acted contrary to section 114(2) in persuading or endeavouring to persuade anyone to do those things set out in section 114(2)(a), (b) and (c). The Board found that to answer this question it was necessary to look to the real intention of those doing the acts. In this case the Board found as follows.[101]

> In our opinion if the actions of the Respondents, regardless of the motive for the actions, persuades anyone not to do those things set out in the legislation then a violation has occurred. In this matter, while the Respondents may have, in all sincerity merely set out to embarrass Pacal, the manner in which they chose to do so persuaded at least one person not to enter Pacal's place of business. In the absence of a legal strike this is a failure to comply with section 114(2)(a) of the Act.

The reasoning of the Board as to intention is contradictory. It is first stated that the Board must look to the real intention of the pickets in deciding if there is a violation of section 114(2). It is then accepted that the pickets may sincerely have not intended to do anything but embarrass Pacal. Later still the Board states[102] "We can readily accept that the Respondents did nothing to prevent the truck from entering the premises and did not intend to persuade anyone from entering."

However the Board goes on to find that the fact that one person did not cross the picket line, even if this was not what the pickets intended, was sufficient to put the picketing within section 114(2). The Board thus equates the result of the picketing with the actions of the pickets, even though it accepts that the result was not what the pickets intended. Had the Board found that the actions of the pickets were not within section 114(2), the pickets would have been classified as information pickets only and thus outside of the operation of section 114. The only recourse of the employers then would have been to issue civil proceedings on the basis of nuisance.

On the reasoning of the Board in the Pacal case however recourse to the law of nuisance would not be necessary in the case of information pickets if at least one person does not cross the picket line.[103]

> That is one of the difficulties that trade unions or persons face when they embark on what may have been intended to be an abstract informational demonstration. Such demonstrations, in themselves, are not contrary to the provisions of the Act, but the effect they have on a person or persons albeit unintentionally, decides whether the actions are a violation of the Act.

The Board did not issue a cease and desist order as the demonstration was not still going on at the time the decision was given. The Pacal case thus limits the scope of information picketing in Alberta.

(ii) The Location of Pickets

Two cases considered by the Board involved the same applicant and respondent. One case occurred in Edmonton and one in Calgary. Both cases involved picketing in pursuance of a lawful strike at Alberta Liquor Control Board outlets. The strike involved employees of the A.L.C.B. However employees of the Alberta Brewers' Agents Ltd. also worked at the same place and would not cross the picket lines.

In the Edmonton case[104] the Board found that although the pickets were peaceful they were trying to persuade A.B.A. employees not to work which would amount to an illegal strike under the Labour Relations Act.[105] "These actions then turn what may have been permissive acts into acts which are unlawful." The Board considered the Court of Appeal decision in Edinburgh Developers and found the case before them to be very similar. The Board issued an interim directive to the striking union to cease doing those acts which violated section 114(2). An interesting point is made in the last paragraph of the decision. The Board makes the suggestion that if one driveway was set aside for A.B.A. employees and A.B.A. customers only and that driveway was not picketed there would be no further need for Board directives.

The suggestion is interesting because the Board is implying that there would therefore be no further breaches of section 114. It may have been that the A.L.C.B. employees on strike could be then classified as information pickets only. However no mention is made of customers of the

A.L.C.B. who would presumably still use entrances being picketed. Some potential customers would not have contracts with the A.L.C.B. to be broken - but some customers might very well have existing contracts which the pickets may persuade them to break. This conduct would constitute "an act otherwise unlawful" under section 114(1) and therefore be illegal on a strict interpretation of section 114. The Board however does not seem to be interpreting section 114 in this fashion, but rather, seems to accept that section 114 is a guarantee of a limited right to picket.

In the second case[106] in Calgary, the respondent union was directly picketing premises of the Alberta Brewers' Agents because, it argued, the A.B.A. had allied itself with the Liquor Control Board so as to prevent the union from effectively picketing within section 114(1). This attempt to introduce the 'ally doctrine' into Alberta law was rejected by the Board.[107]

> Because some A.L.C.B. operations are carried out on A.B.A. premises does not exempt local 50 from adhering to the provisions of the Act.

Once again such conduct, was enjoined under the authority of Edinburgh Developers but again it was not a blanket directive to cease picketing. The directive ordered the pickets to cease doing acts in violation of section 114(2) and to cease picketing an entrance until it was used only by A.L.C.B. employees. Picketing at one site where no A.L.C.B. employees worked was prohibited.

More recently a case decided by the Labour Relations Board has gone some way to re-interpreting section 114. It is Ellis Don Management Services Ltd. v. Sheet Metal Workers International Association, Local Union 8.[108] The case was a complaint by three employers at a multi-employer site where a union was on strike and picketing the entrances. On two days a considerable number of other employees did not cross the picket line and go to work. Counsel for the union said[109] "that the Board must balance the rights of striking employees against the problems of third parties" and this is exactly what the Board endeavoured to do. The Board recognized that,[110]

> ...despite all the inherent problems surrounding picketing, legislators have not seen fit to ban picketing. It is a recognized and accepted form of action during a legal strike.

and further that,[111]

> ...we must look at complaints such as this one on the basis of the facts in each case and consider not only the leading cases such as Edinburgh Developers but also the state of labour relations today, including picketing.

In a similar fashion to the Board in Pacal Blades of Canada v. United Steelworkers of America,[112] the Board in Ellis Don stated that the intention of the pickets was what was important in deciding whether section 114 had been breached. On this basis the Board distinguished Ellis Don from Bennett and White Alberta Ltd.[113] v. Van Reeder, Edinburgh Developers[114] and the Alberta Brewers' Retail Agents[115] cases.

In those cases the court had found that the intent of the pickets was to induce others to breach their contracts. In this case there was no direct evidence of such intent. There was no evidence of violence or intimidation and people were free to cross the picket line, as some did. As a result, the Board found that,[116]

> Common site picketing does not automatically result in the finding of a violation. The trade unions' right to strike and their decision to establish a peaceful picketing line which is not massive, violent, intimidatory or intended to induce other employees to breach their contracts with their employers should carry some weight.

The decision of the Board does make the point that the employers had called no evidence to establish that the union had the intent to induce others to breach their contracts. In subsequent applications then, the employer must ensure he has some direct evidence that the pickets intended that other employees should not cross the picket line. There is also an inference that it might have made a difference if those third party employers affected had filed a complaint of an illegal strike with the Board when their own employees did not attend for work. If such a complaint should occur in a future case it remains to be seen how far the Board might modify its decision in this case. It is also important to note that the Board in Ellis Don does not appear to have been referred to the previous Board decision in Pacal Blades of Canada Ltd. v. United Steelworkers of America.[117] In Pacal Blades it was held that the fact that one person did not cross a picket line, made the picket line illegal. Ellis Don is clearly inconsistent with that ruling.

As it stands however the Ellis Don case represents a considerable departure from previous cases. The intention of the pickets was not related to what actually occurred as a result of the picketing and the Board did not issue an order to limit the picketing in any way. Once again the point is made that on a strict interpretation of section 114(1) the pickets were in breach because they had committed "an act otherwise unlawful" by persuading others not to cross the picket line. However, when the issue of intent is called into play also, the Board or court has more leeway to find that the picketing was not in breach of section 114. The question of how far the courts might be prepared to follow the Ellis Don case is considered in section III(d) of this chapter.

(iii) Procedure and Proof

The Board has shown itself to be unwilling to issue orders prohibiting named individuals from picketing or attributing conduct to a union unless this can be clearly established by the evidence. In Cana Construction Co. Ltd. v. Vinko Talajic[118] it was found that the named individuals were on an illegal strike. However the evidence was not at all clear as to who had been on the picket line. Although the named strikers had been in the area, so had a lot of others and the Board was not prepared to make the assumption that the strikers so named had violated section 114(2), even though it was clear that somebody had. An employer must therefore adduce very clear evidence of the identity of pickets to secure an order to cease picketing from the Board.

In Edmonton Northlands v. United Food and Commercial Workers[119] the complainants alleged that members of the union were distributing leaflets outside their exhibition grounds. The leaflets urged patrons to boycott the products of a struck employer. The complainants alleged a breach of section 114(2). The Board however did not even reach the point of considering section 114(2) because it found that there was no evidence to establish that the persons whose photographs they saw, were members of the union.[120]

> Counsel for Northlands suggested that the Union had failed to satisfy an onus that would require it to present evidence that these persons were not representative of the Union. But no such obligation is imposed on the Union until we have first been presented with a prima facie case which supports the allegation that the individuals are Union representatives.

The complaint was therefore dismissed.

(c) Who May be Persuaded Within the Terms of Section 114

As has been shown in the above cases decided by the courts and the Labour Relations Board the concept of the illegal strike is an important way by which picketing is confined. The picketing may in itself be peaceful, involving only a few people and may be informational in character. However as soon as one employee refuses to cross the picket line section 114(2) comes into play and the picketing is judged to be unlawful because it has caused an illegal strike. This was the case in Edinburgh Developers v. Vanderlaan,[121] the Alberta Brewers Agents[122] cases and Pacal Blades of Canada v. United Steelworkers of America.[123]

In Alberta therefore picketing can never have the effect of causing workers who are not on a legal strike, not to cross a picket line. The only exception has been the case of Ellis Don Management Services Ltd. v. Sheet Metal Workers International Association.[124] The latter case however is outweighed by the Court of Appeal decision in Edinburgh Developers.

By comparison in Britain the legislation does allow for some secondary picketing at the picketing employees own workplace. Section 17(5) of the 1980 Employment Act states that secondary picketing is lawful if carried out within section 15 of T.U.L.R.A. Section 15 allows picketing at the employees own workplace. If such picketing had the effect of causing a truck driver employed by another employer, not to cross the picket line, the picketing would still be lawful under section 17(5). The only proviso is that the truck drivers' employer must not be a party to the dispute. Therefore the protection of section 17(5) would not extend to picketing that caused other employees of the primary employer not to cross the picket line. The pickets would then be liable for inducing breach of contract.

In terms of who may be persuaded by picketing therefore, the current British statutory provisions are wider than those in Alberta. The Alberta provision really makes any effective picketing of other employees who are not on a legal strike impossible.

(d) A Comparison of the Decisions of the Labour Relations Board and The Courts

As shown by the above cases the jurisdiction of the Labour Relations Board and the courts overlap with regard to the regulation of picketing. A comparison may therefore be made of the way in which each forum has dealt with picketing cases.

The courts have dealt harshly with cases involving violence. Law is made that sets precedents for future cases where the picketing may be quite peaceful. The fact that cases of violent and mass picketing tend to be resolved in the courts may give the impression that the courts are more strict in regulating or prohibiting picketing. However the Board has shown that it will generally apply the terms of section 114 in a strict fashion so that it is likely that cases involving violent picketing would be treated no less leniently.

There seems to be a clear difference in the type of regulating orders that emanate from the Board or the court. The courts will regulate the numbers of pickets as was done in the City of Calgary[125] case. The court will also impose detailed restrictions on the pickets who are left in terms of exact measurements from the employers premises. By contrast the Board has not, in the cases discussed, limited the numbers of pickets. The Board will prohibit picketing at locations where it is felt that section 114 is being breached. However, as in the Alberta Brewers' Agents[126] cases the Board will then note where picketing may be carried out within section 114. The defined area is not limited in terms of the distance that the pickets must be from the gateway.

The approach of the Board in respect of the terms of the directives made is preferred. The aim of the Board or the court should be to maintain the status quo as far as possible in an industrial dispute situation, within the terms of the governing statute. Artificial boundaries between the picket line and the employers premises can only serve to increase tension on a picket line. Further, it will be remembered that the courts specifically charge the police with the duty of enforcing the injunction. The more detailed terms of the order ensure that there are more reasons why pickets can be arrested for breach of the injunction. The police are thus brought increasingly into the industrial dispute. Rather than merely policing the picket line they administer it. Whether this is a justifiable role for the police or not is the subject of much heated debate during an industrial dispute. However it is clear that increased intervention of the police during a dispute does increase tensions on a picket line. It is therefore suggested that the detailed limitations imposed by the courts are counter-productive.

With regard to the decision of whether or not to grant an injunction the cases show that the courts weigh considerations which are heavily weighted in favour of the plaintiff. The plaintiff only has to show that there is a serious issue to be tried, which in the majority of cases there will be. Since the Pacific Western Airlines[127] case the plaintiff no longer has to prove irreparable damage where the interests of a third party such as the public are involved. The Board does not use such considerations in deciding whether or not to make a directive. Attention is paid to the surrounding circumstance of a dispute but the basis of the decision of whether or not to make the directive is based on an application of section 114 only.

With regard to the application of section 114 the Board has varied in its attitude. In the Pacal Blades[128] case the Board professed to be looking to the intent of the pickets to determine if the section was breached. In practice however the actions of a third party determined the matter. By contrast in the Ellis Don[129] case the Board declined to follow Edinburgh Developers[130] on the basis that the pickets did not intend to induce an illegal strike by other workers who would not cross the picket line. The Ellis Don case is quite remarkable because the Board usually considers itself bound by judicial precedent on every aspect of law outside of labour relations and on every aspect of law within labour relations if there is a previous court decision specifically on the point.[131] In the fact situation of the Ellis Don case, Edinburgh Developers was clearly on point but the Board chose to distinguish the latter case.

It remains to be seen how far the courts will follow Ellis Don. The courts certainly have a preference for taking judicial notice of the union rule of not crossing a picket line and equating the failure to cross the picket line with an illegal strike. In cases that have arisen since Edinburgh Developers Ltd., the principle in that case has been applied and followed without question.[132] Given, therefore, the pattern of court decisions since Edinburgh Developers Ltd., it does not seem likely that the courts would adopt the reasoning in Ellis Don. Perhaps the best that can be hoped is that the next similar decision also emanates from the Board and builds on the decision in Ellis Don.

If the courts did not then follow the Board decisions, there would in effect be two standards for picketing law in Alberta. However, if this situation did arise, it is the decisions of the courts which would carry more weight, particularly if it was a Court of Appeal decision.

The view has been expressed by some commentators that labour relations boards should have sole jurisdiction in matters relating to industrial disputes.[133] The reasoning behind this view is that the Board is more informal than a court and is composed of members more familiar with industrial relations than many judges are. It is useful to look at the powers that the Board and the court respectively possess.

The guidelines of the Labour Relations Board for the processing of complaints alleging an illegal strike or picketing[134] provide that a Board officer may be appointed to investigate and try to arrange a satisfactory conclusion to such applications. That a case has been thoroughly investigated is evident from the nature of the decisions that the Board produces.[135] In the case of a labour dispute it is very important that the background to the dispute is taken into account.

A judge can request more information from a party during a trial if he does not sufficiently understand a point. However the courts have a mandate to deal only with the matters that are brought before them. There is no requirement for the judges to be familiar with the causes of a particular dispute.

Urgent applications can be brought before the courts within hours. The Labour Relations Board also has the power to hear applications within hours for a cease and desist order. The current practice of the Board is, in the majority of cases to issue written reasons for the decision at a later date. Written reasons for the granting of an interlocutory injunction are not generally forthcoming from the Alberta courts. The presumption seems to be that the issues will be dealt with at trial. In the circumstances of an industrial dispute however there will rarely be a trial after the imposition of an interlocutory injunction. Written reasons for the imposition of an interlocutory injunction which will generally dispose of the matter are important. The reasoning of decision makers should be open to scrutiny, particulary where the matter is often thereby disposed with.

Both the Board and the courts have the power to award damages. The Board however, is limited to compensatory damages only.[136] It cannot award punitive damages. This point may account for the fact that more institution type employers use the Board. As a matter of politics such employers may be unlikely to seek large punitive awards from the unions. The modern day trend appears to be that private employers are more willing to pursue their actions through to trial in order to recover damages from the union.

With regard to the enforcement of orders there is some difference in procedure. The courts issue an injunction and will charge the police with enforcing it. Offenders can be arrested for breach of the injunction and they and the union can be cited for civil or criminal contempt. Directives issued by the Board do not charge the police to enforce them. If the directive is not observed the employer must bring the matter back before the Board. After hearing the evidence the Board has a discretion as to whether to file the case with the court in the relevant judicial district.[137] The directive then becomes effective as a court order and conduct in contravention of the order constitutes contempt of court. This procedure was followed by the Board in the case of the illegal strike by Alberta nurses in 1988.

With regard to the nurses strike an interesting point has arisen as to notice. After the directive was filed with the court individual nurses were cited for civil contempt. An issue arose as to whether the nurses had to be served with additional notice that the directive was now effective as a court order as well as notice of the original directive. In Calgary Medhurst J.[138] dismissed the contempt charges on the basis that the additional notice had not been given. In Edmonton[139] Day J. upheld the contempt charges. The point will now be decided by the Court of Appeal. The likelihood is that the Court of Appeal will decide that additional notice does have to be given. If breach of a Labour Relations Board directive alone could support charges for contempt there is a risk that section 96 of the British North America Act[140] could be infringed.

However, it is difficult to see why the mere fact of registration with the court should change the fact that it is still essentially a Board directive. It is in a sense an artificial distinction to get around the problem of section 96.

Section 96 of the British North America Act 1867 is the very reason why Labour Relations Boards are unlikely to be given sole jurisdiction over all aspects of labour relations. The 1867 Act sets out the Canadian Constitution. Section 96 provides that superior courts have to be under the jurisdiction of the Federal Government. A tribunal appointed by provincial legislation must not trespass on any of the areas exclusively dealt with by the superior courts otherwise it will be declared to be ultra vires the jurisdiction of the province.

A potential problem arises in that many statutes creating tribunals include a privative clause which seeks to limit judicial review of the tribunals' decisions by the courts. The courts would get around such clauses by holding that privative clauses did not protect the tribunal from jurisdictional errors. In Crevier v. Attorney General of Quebec[141] the Supreme Court held that a privative clause which purported to exclude any avenue of judicial review was a contravention of section 96 and should be struck down as being unconstitutional. The result of the case is that privative clauses if worded appropriately will only prevent judicial review on questions not concerning the jurisdiction of the tribunal. A provincial statutory tribunal cannot determine the limits of its jurisdiction without judicial review.

The law with regard to review of tribunal decisions has therefore developed as follows. An error of law made outside of the jurisdiction of the tribunal is always reviewable, whether or not it is patently unreasonable. An error of law made within the jurisdiction of the tribunal is not reviewable, unless the error is found to be patently unreasonable. The test was refined by the Supreme Court in C.U.P.E. v. New Brunswick Liquor Corporation[142] where it was held that it would be patently unreasonable for the tribunal to act in bad faith, base a decision on extraneous matters, fail to take into account relevant facts, breach the requirements of natural justice or misinterpret provisions of the Act so as to answer an irrelevant question.

The Alberta Labour Relations Act contains a privative clause in section 18.[143] Section 18(1) states that the Board has exclusive jurisdiction to exercise its powers and that its decisions are final and binding. Section 18(2) states that no ruling of the Board can be reviewed or questioned in any court. Section 18(3) allows such review by certiorari or mandamus if the application is held in court and served on the Board no later than thirty days from the Board's original decision. Applying the common law rules to section 18 would seem to imply that section 18(2) would not prevent judicial review of a Board decision after the expiry of the 30 day time limit if the Board's decision was outside its jurisdiction and therefore a nullity or if the decision was within the Board's jurisdiction, but was patently unreasonable.

However, there is direct authority in Alberta stating that this is not so. In Re Canadian Pittsburgh Industries and International Association of Bridge, Structural and Ornamental Ironworkers,[144] McDonald J. held that the 30 day time limit precludes judicial review on any ground if the time limit is not complied with. McDonald J. conceded that there might be an exception if a decision of the Board was impugned on the basis that it was acting outside its jurisdiction because of the provisions of section 91 or 92 of the British North America Act 1867.[145] In Alberta Union of Provincial Employees v. Board of Governors of Olds College[146] the Supreme Court of Canada held that the review of the court should be limited to inquiring whether the interpretation of the board was so patently unreasonable that it could not be rationally supported by the legislation in question.

In fact a small percentage of the Board's total decisions are reviewed. In 1987 out of 78 written decisions, 15 were reviewed.[147] However the power to review definitely exists in the circumstances as outlined above. Despite the fact that the Labour Relations Board does appear to be better equipped to deal with industrial disputes the nature of the Canadian constitution will, for the present, prevent them from having exclusive jurisdiction in those cases.

III The Charter of Rights and Freedoms[148]

In 1960 a Bill of Rights was passed by the Federal Government.[149] The Bill of Rights was however a federal statute and therefore had no application to provincial or municipal legislation. In addition the Bill of Rights was not constitutionally entrenched. The Bill of Rights was used mainly as a tool of interpretation by the courts,[150] as were the various provincial human rights statutes. Alberta had possessed such legislation in the form of a provincial Bill of Rights since 1972.[151]

In 1982 a new element was added to the law in Canada in many areas, with the passage of the Charter. Unlike the Bill of Rights the Charter is entrenched in the Constitution and can be relied upon as a guarantee of individual rights. The Bill of Rights and the Alberta Bill of Rights have not been repealed but their relevance is now much reduced.[152]

So far as the law relating to picketing and industrial conflict is concerned, several provisions of the Charter are of immediate interest. Section two provides that:-

> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

Every section of the Charter, however, is subject to section one which provides that;

> The Canadian Charter of Rights and freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law or can be demonstrably justified in a free and democratic society.

Labour lawyers and trade unionists wanted to know if, as a result of the Charter, picketing would be protected under the banner of freedom of expression, particularly secondary picketing, and whether freedom of association extended to protection for the activities of an association, for example striking. There are now two Supreme Court decisions in both these areas. The case concerning the right to strike originated from Alberta. It will be remembered that as in other provinces various groups of employees were excluded from the operation of the Labour Relations Act. These employees did not therefore have the right to strike or to picket.

(1) The Right to Strike

The issue of freedom of association came before the Supreme Court in Alberta Union of Provincial Employees v. Attorney General of Alberta.[153] The case concerned the rights of public servants, policemen, firefighters and nurses to strike. Rights which had been taken away by various statutes[154] and substituted for by compulsory arbitration. The argument, based on the Charter, for not excluding the right to strike is encapsulated in this already much-quoted section of a case decided by the Divisional Court in Ontario.[155]

> But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law.

As is indicated by the quote, the Ontario court held that freedom of association included the lawful objects of the association, which for trade unions meant freedom to organize, to bargain collectively and to strike. The same year a Federal Court of Appeal decision[156] held exactly the opposite viewpoint; that freedom of association did not protect the objects of the organization. This was also the view of the British Columbia Court of Appeal in the Dolphin Delivery[157] case and first instance courts in Newfoundland,[158] Manitoba[159] and Nova Scotia.[160] These courts took much of their reasoning in turn from a Privy Council decision, Collymore v. Attorney General,[161] a case on the same issue which originated from Trinidad and Tobago.

The Alberta Court of Appeal in Alberta Union of Provincial Employees v. Attorney General of Alberta[162] held that the statutory sections in question did not offend freedom of association as guaranteed by the Charter. In the Supreme Court, the Chief Justice and Wilson J. dissented from the majority. The majority agreed with the result reached by the Alberta Court of Appeal. The majority decision was given by LeDain J. LeDain J. chose to look at the issue in the wider context of all associations which might argue that their objects were guaranteed by the Charter. He did not agree that freedom of association was an empty concept, but felt that it was an important component in exercising other freedoms such as freedom of religion. Moreover LeDain J. pointed out that freedom of association should not be taken for granted. The right to belong to an organization was important in itself.

Finally LeDain J. states that the right to strike and to bargain collectively are not fundamental freedoms but are matters for legislative policy. The Court, in his view, is not suited to adjudicating on such issues.

In a separate decision McIntryre J. found that section 2(d) applied to rights of association that were also protected by the Charter when exercised by the individual. He went on to say that[163]

> ...freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally-guaranteed freedom to do what is unlawful for the individual.

As the right to strike is not independently protected by the Charter, McIntyre J. found that it can only be protected under section 2(d) if it is an activity that an individual can lawfully do, which in the case of striking is not so.

It has been said that the Charter is essentially a document that protects individual rights and not group actions. In the context of freedom of association, this means protecting the right of every individual to join a group only. However, such a proposition ignores facts of modern day life which necessitate group action in many areas. The Charter was enacted in 1982 and it was not passed in a vacuum. It must be assumed that the provisions were meant to reflect current values and trends, or that its terms were drawn wide enough to include realities of modern day life.[164]

With regard to trade unions, the reality is that they are now accepted as the collective voice of individual workers who each have a choice to join a union or not. If the predominant function of unions, which is collective bargaining, is not also protected under the Charter, then the courts are choosing to ignore the important function of unions in modern day life. It is all very well to state that the freedom of the individual is protected by allowing him to join associations, but what kind of freedom is it if the legitimate objects of the association are not also protected? An association is made up of individuals and their collective freedom to join is meaningless if their lawful collective aims are not also protected. The reasoning of one commentator in this regard is arguably more persuasive.[165]

> ...associations which advance political, religious, egalitarian and certain economic interests are entitled to the protection of section 2(d) of the Charter. The interests advanced by such associations are critical and fundamental to Canadian society. It is safe to conclude that the drafters of the Charter had at least these groups in mind when freedom of association was entrenched in Canadian law.

By tradition and necessity, trade unionism is a group activity in order to endeavour to redress the balance between employer and employee. However, every individual member has a choice of whether or not to strike. He can vote against it in those provinces, including Alberta which require a strike vote and he can work in spite of the strike. It is an individual decision for which he may not be penalized by his union. This again demonstrates the difficulty in limiting the protection of the Charter on the basis of individual as compared to group actions because the individual is already well-protected by statute from group pressure.

Throughout the judgment of McIntyre J. there is much discussion of the 'objects' of an association being protected. Surely the object of a trade union cannot fairly be described as to go on strike? The object of a trade union, in the words of Mahoney J. is 'the economic betterment of its membership'.[166] Striking is an activity of a trade union and one which in Canada can only lawfully be carried out if certain criteria are met. The economic betterment of its membership[167] is a somewhat esoteric concept which could not really be defined in terms of a right. Even McIntyre J. makes this distinction in his judgment when he says,[168]

> Of the remaining approaches, it must surely be accepted that the concept of freedom of association includes at least the right to join with others in lawful common pursuits and to establish and maintain organizations and associations as set out in the first approach. This is essentially the freedom of association enjoyed prior to the adoption of the Charter.

To then go on and discuss freedom of association in terms of individual and group actions entirely contradicts the above paragraph.

McIntyre J. also adopts in his reasoning the argument put forward by J.W. Weiler[169] that giving collective bargaining and the right to strike protection under the Charter will give too much power to the judges in an area where legislators have more expertise. The scenario is envisioned whereby litigants will take different aspects of collective bargaining law to the courts who are unequipped and unsuitable to adjudicate on such matters. The fact that litigants might do this is of course quite possible. However the Charter is concerned with the constitutionality of legislation. It is likely that in the years to come many of the numerous sections of the Criminal Code will be scrutinized in the light of the Charter. Defendants will delay as their cases move slowly to the Supreme Court. Why should the situation be any different for labour relations statutes? The courts always have the power under section 1 to restrict the exercise of Charter freedoms and the provinces have the power under section 33 to override Charter provisions completely.

However, it has to be accepted that if giving collective bargaining protection under the Charter is interpreted as allowing unions or employers to question each and every aspect of labour relations legislation in the courts, the consequences might far outweigh any short-term gains for the unions. The decisions in Dolphin Delivery and the AUPE case show that the Supreme Court is not prepared to be innovative. The Court has merely found reasons to entrench the statutory and common law provisions that the unions objected to. The unions might be better advised to make their pleas for change elsewhere than in the courts.

The majority in the AUPE case could not even justify extending freedom of association to collective bargaining which is surely one of the true objects of a trade union. The existence of trade unions and their functions are part of the fundamental democratic nature of Canadian society and should have been recognized by the Court as such.

Quite different in its approach is the dissent of the Chief Justice. As is appropriate in an issue involving human rights, he discusses the major authorities including Canadian jurisprudence, the Privy Council decision of Collymore v. Attorney General,[170] American cases and international law obligations. The latter item was not even mentioned by McIntyre J. and this must be seen as an important omission when Canada has acceded to two United Nations' Covenants[171] which deal with freedom of association and the right to strike, and ratified a convention of the International Labour Organization[172] dealing with the same issues. The latter is even more important in that the Committee of the I.L.O. recently looked into a complaint by the Canadian Labour Congress on behalf of the Alberta Union of Public Employees on the sections that were the subject of this appeal and concluded that they violated the convention.[173] It is true that by ratifying the convention and the covenants, Canada did not promise to constitutionally entrench their provisions, but if it is legislative intention you are looking for, what better evidence than the agreement to international standards?

Having considered all these sources, the Chief Justice concludes that,[174]

> ...while it is unquestionable that s.2(d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed.

Having reached this conclusion he proceeds to discuss whether any limits on the freedom is justified under section 1 and finds that the only real justification is the protection of essential services. The limitation is only necessary in the case of policemen and firefighters and not the bulk of hospital workers or public servants. Further considered is the fairness of the compulsory arbitration provisions of policemen and firefighters as a substitution of the right to strike. In all three Acts he finds[175] that the arbitration provisions are not an adequate replacement.

The Chief Justice is thus fulfilling his mandate under the Charter in considering the legislation in the light of current human rights standards nationally and internationally. He then balances what was taken away with what was given back to the employees in terms of mediation and finds the provisions wanting. In contrast to the majority the Chief Justice is not merely finding reasons to uphold the status quo.

It may be that those employees who still do not have the right to strike may still be able to challenge this under section 15 of the Charter, the equality section which provides,

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Undoubtedly this section will generate its own jurisprudence, but it is to be hoped that the courts will not shy from removing the distinction of not having the right to strike from the statutes, where that distinction is not justified. Given the tenor of the decision in the AUPE case however, it is more likely that the courts will use the reasons of essential services and government pressure to place limits on any inequality found to exist.

(2) The Right to Picket

The question of whether picketing was protected as a fundamental freedom was considered by various lower courts before a case reached the Supreme Court of Canada. In a case which predated the Charter, the issue was discussed in relation to the Federal Bill of Rights by the British Columbia Court of Appeal.

Koss v. Konn[176] involved a building contractor who was employing non-union labour. A representative of the union approached the contractor with regard to employing union labour. The contractor refused to consider it. The defendant then walked up and down outside the job-site carrying a placard which read "Non-union men are working on this job". Some suppliers refused to cross the picket line. Section 3 of the British Columbia Trade Union Act[177] was in very similar terms to section 114 of the Alberta Labour Act.

The defendants appealed the imposition of an interlocutory injunction, firstly on the basis that the picketing was informational in character and therefore outside the terms of the statute. Secondly it was alleged that section 3(2) (similar to section 114(2)) infringed the principle of freedom of speech and was ultra vires the Legislature of British Columbia. The majority of the court held that the picketing was not informational in character. This aspect of the case was considered in chapter 4.

With regard to freedom of speech the majority held that section 3 related to property and civil rights which was within the legislative jurisdiction of the provincial legislature. In characterising the legislation as concerned with property and civil rights, Tysoe J.A. looked to the true purpose of section 3(2). He found that,[178]

> The true object, purpose, nature or character of s-s.(2) is, in my opinion, protection of the liberty of a person to carry on his legitimate business in the Province and to the use of his premises without interference, except when he is an employer who is himself involved in a legal strike or a lock-out. The subsection is in no way directed to the suppression of free speech, albeit it may have the incidental effect of limiting what one person may say of or about another and his business.

Norris J.A. dissented from the majority on the basis that the picketing was informational and was not affected by section 3. He therefore found section 3 to have a different application which was not ultra vires the Province.

After the Charter was passed the Newfoundland Court of Appeal in Re United Association of Journeymen and Apprentices of the Plumbing Industry of United States and Canada, Local 740 v. Pitts Atlantic Construction Ltd.[179] held that an injunction granted in a similar fact situation to Edinburgh Developers Ltd. v. Vanderlaan[180] was not inconsistent with section 2(b), (c) or (d) of the Charter. The relevant section of the Newfoundland Act[181] is virtually identical in terms to section 114 of the Alberta Act. The court held that the section merely gave statutory effect to the common law rights of third party employers to seek redress against those who cause injury by acting together or who procure or induce a breach of contract. There is however a lack of analysis in the case which makes it difficult to see how the court came to this conclusion.

The decision in Pitts Atlantic Construction and indeed the decision in Edinburgh Developers must now be studied in the light of the analysis by the British Columbia Court of Appeal and the Supreme Court of Canada in Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.[182] In Dolphin Delivery the respondent claimed that it was the victim of secondary picketing by the union. The union had members who had been locked out by their employer Purolater. Prior to the dispute the respondent had made deliveries for Purolater. The union claimed that the respondent was an ally of its own employer and the union was therefore entitled to picket the respondents' premises. Two interesting points in the case were firstly that the facts came within the Canada Labour Code[183] which was silent on picketing and therefore the complaints were made by way of the common law torts of conspiracy to injure and inducing breach of contract. The second point was that no picketing actually occurred because an injunction was obtained before it could begin. Thus the Court of Appeal had to speculate as to the sequence of events.[184] This reasoning was then adopted by the Supreme Court.[185]

Both freedom of expression and association were argued in the Court of Appeal, but only freedom of expression in the Supreme Court. The Court of Appeal accepted the finding of the chambers judge that the respondent was not an ally of the primary employer. While accepting that picketing was a form of expression, Esson J.A. and Taggart J.A. did not accept that the protection of the Charter extended to all forms of picketing and in particular the secondary picketing in this case. Further, even if the protection did extend to this case, it was held that the use of section 1 of the Charter was justified to limit picketing. Hutcheon J.A. agreed with the latter of these two propositions so far as the purpose of the picketing was to induce a breach of contract.[186]

The judgments in the Supreme Court are concerned with issues under three sections of the Charter. These sections will be dealt with individually. Seven justices heard the case in the Supreme Court and three judgments were given by McIntyre J., Beetz J. and Wilson J.

(a) Section 32

Dolphin Delivery decided the issue of whom the Charter applied to. Up until this point it was not clear if it applied to government action only or if it also applied to litigation between two private parties.[187] The argument centred on two particular sections of the Charter. Section 32[188] of the Charter states that it applies to the Parliament and government of Canada and the legislatures and governments of each province. Section 52[189] of the Charter proclaims that the Constitution is the supreme law of Canada and any law inconsistent with the constitution is of no force and effect. McIntyre J. held that the effect of section 52 was that the Charter applied to the common law as well as statute law.

McIntyre J. then interpreted section 32 by finding that it only referred to a branch of government - the executive or administrative branch, not the judicial branch. So if the legislature relied on statutory authority for a certain action the Charter would apply and the action might be unconstitutional. Also if the legislature was relying on a common law rule such as the royal prerogative the action might be unconstitutional.

With regard to suits between private parties McIntyre J. held that a court order is not to be defined as government action. If that were the case then all judgments would be subject to review in the light of the Charter. The judge went on to hold that there must be a direct and precisely defined connection between government action and the claim advanced for the Charter to apply in private litigation. Such an example was the case of Re Blainey and Ontario Hockey Association[190] where a girl was excluded from playing hockey on the basis of her sex. The girl made a complaint under the Ontario Human Rights Code,[191] but the Human Rights

Commission said that it could not act in the matter because the Code provided for discrimination with regard to athletic activity. The Supreme Court of Ontario struck down the discrimination clause of the Code as it conflicted with the Charter.

Other examples given by McIntyre J. of government action that would allow private litigants to rely on the Charter are forms of delegated legislation and possibly municipal by-laws. However in a private suit such as Dolphin Delivery where one party is relying on the common law only the Charter does not apply. Although the Charter applies to the common law in that judges must develop the law in accordance with the principles of the Charter, it does not apply in cases where there is no exercise of, or reliance on government action.

(b) Section 2

Section 2 of the Charter guarantees amongst other fundamental freedoms, freedom of expression. In a decision of a few lines Beetz J. adopted the reasoning of the British Columbia Court of Appeal that the type of picketing in this case was not a form of expression, so that no question of infringing the Charter arose. Beetz J. actually concurs with the decisions of Esson J.A. and Taggart J.A. in the Court of Appeal.[192] Those judges had agreed that no question of freedom of expression arose because this type of picketing, i.e. secondary picketing was not a form of expression. They classified the picketing as action or conduct which would be a sign to others not to cross the picket line.

The remainder of the justices in the Supreme Court agreed that picketing was protected under the Charter but that in certain circumstances a limitation on the exercise of the freedom was justified under section 1 of the Charter. Wilson J. disagreed with the majority as to the nature of the test to be applied under section 1 of the Charter.

McIntyre J. delivered the majority opinion of the Supreme Court. He held that all picketing involves some kind of expression even when the purpose is to induce a breach of contract. That purpose alone would not be sufficient to remove the protection of freedom of expression. McIntyre J. went on to hold that some actions by pickets would alter the nature of the situation and deprive the picketing of Charter protection.[193] "That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct." In the present case however the picketing was peaceful.

(c) Section 1

Having first concluded that peaceful picketing was protected under the Charter, McIntyre J. moved on to consider whether a limitation on the freedom to picket was justified in a free and democratic society. In weighing the two sides of damage to the employer versus limiting a Charter protected freedom, McIntyre J. found that an additional factor was that it was secondary picketing that was taking place. Moreover it was secondary picketing of a third party not involved in the dispute. McIntyre J. comments that[194] "While picketing is, no doubt, a legislative weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others." He notes that secondary picketing is statutorily unlawful in British Columbia and that an application of section 1 of the Charter to limit secondary picketing would not be inconsistent with that policy. McIntyre J. refuses to acknowledge the fact that an interim injunction will often end a labour dispute.[195] "I would say that the requirement of proportionality is also met, particulary when it is recalled that this is an interim injunction effective only until trial when the issues may be more fully canvassed on fuller evidence."

It is not entirely clear from the judgment of McIntyre J. what other unlawful acts would be sufficient to exclude picketing from the protection of freedom of expression. He appears to be referring to criminal acts as opposed to tortious acts and indeed specifically states that inducing breach of contract would not remove the protection of freedom of expression.

Wilson J. agreed with the majority opinion that picketing was protected activity under the head of freedom of expression. However she advocated a different test under section 1 to see if the freedom should be limited.[196] The test that she advocates is enunciated as follows.

> There are, as I see, two distinct questions which must be answered, namely:

(1) Does the tort of inducing breach of contract represent a reasonable limit under section 1, on freedom of expression in the labour relations context? and
(2) If the tort does represent a reasonable limit under section 1, should injunctive relief be granted in this particular case?

The first question she argues should be answered in an objective fashion and if answered in the affirmative, the second question is a subjective test on the facts of a particular case. It is suggested however that once the first question had been answered in the affirmative by the Supreme Court, only the second question would have to be considered in future cases. Supreme Court decisions are not binding on itself but previous decisions are not overruled lightly or often. If the answer was yes to the first question, that would effectively remove all picketing of a persuasive nature from Charter protection. It is also suggested that in advocating a test under section 1 involving an evaluation of the tort of inducing breach of contract, Wilson J. is perpetuating the life of this tort which should no longer have a place in labour relations.

(d) Effect of the Decision

The effect of the decision in Dolphin Delivery for future cases involving labour disputes is that an injunction, as a court order, can never be the subject of review in the light of the Charter because the Charter does not apply to action by the courts. For the purposes of the Charter the courts are not part of the government of Canada.

The contradictions which this reasoning entails have already been pointed out by other commentators.[197] To state that the judiciary is not an arm of government is to ignore both tradition and reality. An injunction if breached, will set in motion many enforcement powers of the state including imprisonment for contempt.[198] Further the Supreme Court in interpreting the Charter has a mandate to make law on constitutional issues which have to be recognized by other levels of government. To say on the one hand that the judges must interpret and form the common law according to Charter principles and on the other hand that the common law enunciated by the judges is not subject to scrutiny on the basis of the Charter is contradictory and will operate to exclude from Charter review a great part of the law of Canada. The reasoning of McIntyre J. puts the judges above the law of the Charter which is proclaimed to be the Supreme law of Canada.

So far as trade unionists are concerned the decision in Dolphin Delivery means that picketing of an employer which can be enjoined on the basis that it is inducing other employees, suppliers or customers to break their contracts with the employer, can never be protected under the Charter as freedom of expression as long as the suit is between private parties.

With regard to section 114 of the Alberta Labour Act the argument almost becomes circular. As has been shown above the courts still require the commission of a tort upon which to base an injunction for illegal picketing under section 114 as it is not clear that individuals can maintain an action for breach of a statute with penal provisions. The Labour Relations Board seems to be more willing to ignore the question of tortious liability and deal with breach of statute per se; but the position is far from clear. If a subsequent enactment did abolish the economic torts so that an action would lie for breach of statute only, then according to McIntyre J. the picketing would be protected as freedom of expression.

However a judge would them have to proceed to the test under section 1 of the Charter. Following McIntyre J., it would be relevant to look to the law of the province. Section 114 clearly prohibits secondary picketing and picketing at common employer sites. As has been suggested elsewhere in this chapter it can even be argued that section 114 prohibits all effective persuasive picketing. By raising a defence under the Charter the union would have wasted its time. If the picketing only involved a few peaceful demonstrators at their own place of employment the union would already know that was lawful under section 114. If the picketing was at any other location or was in any form other than purely informational, the union would already know that that was unlawful under section 114. As has been shown by cases such as Koss v. Konn[199] even what might appear to be purely informational picketing can be classified as persuasive picketing. By referring back to the provincial statute as a test of what is reasonable in a democratic society McIntyre J. is merely entrenching the law as it already stands. If there were no common law torts and a union raised the argument that the statute prohibiting certain forms of picketing was unconstitutional, the union would lose. The provincial statute would be the yardstick by which the picketing was measured.

If the legislation on picketing is to be challenged then the Supreme Court has a mandate to examine it in the light of the Charter and come up with more substantial reasons as to why secondary picketing is or is not practicing freedom of expression. The confused way in which the Court has dealt with Dolphin Delivery has left the law in more confusion than ever. It remains to be seen how the Court will treat other aspects of the common law when the circumstances do not involve a labour dispute.

IV The Criminal Liability of Pickets

(1) Criminal Code Offences

(a) Mischief

Section 387 of the Criminal Code[200] provides for a series of offences under the general heading of mischief. The offences relate to the damage of property or causing danger to life. Section 387(6) excludes from liability for mischief those on strike and section 387(7) excludes from liability those who attend at a place to obtain or communicate information.

R v. Mammolita[201] involved a defendant who was picketing with others at the entrance to the Hawker Siddely plant in Thunder Bay. The employees were on a legal strike. The pickets were walking around in a circle to prevent vehicles from entering the plant. An injunction had already been issued to restrain the picketing and the pickets were in violation of the terms of the injunction. With others, the defendant was charged under section 387(1)(c) of the Code that by mischief he had wilfully obstructed or interfered with the lawful use and operation of the employers' property. There is no indication in the case as to exactly why there was a prosecution given the contents of section 387(6) and (7).

The trial judge acquitted the defendants because he found that the Crown had not established any overt act or participation on the part of the accused. Mere presence and passive acquiescence did not make them liable as aiders and abettors of the offence.

On appeal, the district court judge ordered a new trial. The defendants appealed and the Ontario Court of Appeal agreed with the district court judge. The Court considered the degree of intent required by section 387. Section 386 of the Code defines "wilfully" to include recklessness and knowledge that an act will probably cause a certain event. Therefore the Court concluded that,[202]

> It may not be very difficult to infer that a person standing shoulder to shoulder with other persons in a group so as to block a roadway knows that his act will probably cause the obstruction and is reckless if he does not extricate himself from the group. This is particularly the case if the person knows of the existence of a strike and is confronting a large group of police officers who are trying to clear a passage. The same conclusion could be drawn where a person is part of a group which was walking around in a circle blocking a roadway. Those who are standing on the fringe of the

> group blocking the roadway may similarly be principals if they are preventing the group blocking the roadway from being bypassed.

Conduct such as that described in the above quote was held by the court to be sufficient to secure a conviction as a principal of an offence committed under section 387(1)(c). The court directed that the new trial judge should take into account the possibility of a successful defence under section 387(7) which provides that no mischief is committed if a person is attending only to obtain or communicate information.

The court also concluded that to be liable as an aider or abettor under section 387 there must be an act of assistance or encouragement. It was held that[203] "...the act of assistance or encouragement may be the presence of the accused at the scene of the crime during its commission if the aider or abettor is there for that purpose". In order to find liability on this basis then the court would have to form an objective opinion as to why an alleged offender was present at the picket line. In the absence of extraneous evidence, such as the presence of cameras which would justify the presence of a reporter, mere observers therefore run the risk of being charged as an aider or abettor under section 387(1)(c).

The civil injunction had allowed ten people to picket. The Court of Appeal found that the new trial judge should not assume that ten of those present could not therefore be guilty of the criminal offence. The overlap of the terms of the civil injunction with the criminal statute in R v. Mammolita is a good example of how the law can operate in a contradictory fashion in respect to picketing. The civil injunction gave ten people lawful authority to be present to picket peacefully. However ten people are capable of forming an obstruction to the use of the employers' property. Even if those ten people were picketing peacefully they would still be at risk of being charged under section 387(1)(c). However any of the arrested people may have had a good defence under section 387(7). The court does not explain why ten of those charged could not be deemed to have lawful authority to be present under the terms of the injunction, but stated that that was a matter for contempt proceedings. Just as the British courts did in Broome v. D.P.P.,[204] the Ontario Court of Appeal was not prepared to consider any relationship between the civil order made on the basis of the civil statute and the criminal statute. Further, as stated above, there is no indication of why the prosecution was brought when section 387(6) and (7) would appear to exclude the pickets from liability under section 387.

R v. Nielsen[205] was an unreported decision of a provincial court in Alberta. Judge Ketchum considered the appeal against conviction under section 387(1)(c) of a striking postal worker. The defendant had formed part of a group that surrounded a bus of strikebreakers. The police evidence was that the defendant was seen pushing on the doors of the bus. The police officer warned the defendant twice and when she continued her activity he arrested her. The incident took approximately 5 minutes and the time the defendant took pushing on the bus doors was not more than 1 or 2 minutes. The defendant was charged with obstructing, interrupting or interfering with the lawful use of property.

With regard to the required mental element for committing an offence under section 387(1)(c), Judge Ketchum held as follows.[206]

> In the context of this case I find that the Crown has to prove that Mrs. Nielsen's acts would probably cause a prohibited occurrence, namely obstruction, interruption or interference with the lawful use, enjoyment or operation of property. The Crown's obligation is to show more than a possibility but not as much as a planned and deliberate action.

Judge Ketchum accepted the evidence of the police officer and held that the defendant had the required mental element. Further, her actions in relation to the doors of the bus constituted interference with the lawful operation of the bus.

Earlier in the case Judge Ketchum had considered the nature of conduct that would be within section 387(1)(c).[207]

> I find the wording of that section to be so broad and all inclusive that it could catch everything from a momentary interference with the operation of property such as a person running in front of a car, to a deliberate act of sabotage.

Such a wide definition would catch many acts on the picket line where incidents often occur spontaneously without prior planning.

(b) Disorderly Conduct; Section 171[208]

It was shown in the previous chapter that judges have differed in their interpretation of section 171 of the Code. Section 171 creates the offence of causing a disturbance in a public place by various forms of conduct. Some judges found that the disturbance was created by committing acts prohibited by section 171 as in R v. Swinimer.[209] Other judges found that a separate disturbance had to be caused by the conduct, as in R v. Goddard.[210]

The contradiction in the cases has continued since 1980. In R v. Berry[211] pickets were demonstrating outside business premises and were alleged to be impeding the entry of vehicles to the premises. The trial judge acquitted the defendant of a charge under section 171 under the authority of R v. Goddard.[212] The county court judge convicted the defendant and the result was endorsed by the Ontario Court of Appeal. In an extremely short judgment Jessup J.A. found that R v. Goddard [213] was wrongly decided in one respect. He held that the words "by impeding" in section 171(a)(ii) did not require proof of an affray, riot or unlawful assembly as had been found in R v. Goddard. The word disturbance was to be given its ordinary meaning and on the facts of this case the offence was found to be proved.

In Peters v. R[214] Taggart J.A. of the British Columbia Court of Appeal took what might be called a common sense view of section 171.[215]

> I can envisage circumstances in which the conduct described in the section might, by itself, be sufficient to enable one to say that it caused a disturbance. On the other hand, while the conduct of the accused may fall within the kinds of conduct described in the section, it may not, by itself, have caused a disturbance. If the conduct of the accused is of one or more of the kinds described in the section and causes what is described in R v. CD as a "secondary" reaction on the part of other persons in the vicinity and the

> secondary activity causes a disturbance, then it would appear to be beyond question that the conduct of the accused has caused a disturbance and that a conviction must result.

In Peters v. R a defendant was acquitted of swearing at a police officer as it was held that a disturbance had not been caused.

In R v. Waniandy[216] on the other hand Grotsky J. of the Saskatchewan Court of Queen's Bench adopted the reasoning in R v. Swinimer[217] and convicted a person for causing a commotion outside a dwelling house when there was nobody outside the house to be disturbed. Just three weeks later,[218] Vancise J. of the same court quashed a conviction under section 171. The judge held that,[219]

> A disturbance is disorderly conduct which must interrupt the peace and tranquility of the community, and there must be persons affected by the conduct of the accused.

In Alberta the preference would appear to be for the reasoning in R v. Swinimer that a separate disturbance need not be caused. In R v. Skead[220] native people were charged under section 171 when they marched without a permit through Calgary. In the provincial court Cioni P.C.J. records that two previous unreported Alberta decisions had already adopted R v. Swinimer as the correct statement of the law.[221] Cioni P.C.J. adopted the case also.[222] "It is not necessary to cause a secondary disturbance. The doing of an act that is disturbing to someone, as enumerated in section 171 is sufficient for conviction." The statement is however tempered by accepting that,[223] "Whether a disturbance has occurred is a question of fact and depends on the degree and intensity of the activity complained of, and on the degree and nature of the "peace" which should be expected to prevail in the particular public place at the particular time." In the instant case it was found that the degree of apprehended disturbance was not sufficient for a conviction.[224]

The test that would therefore appear to apply in Alberta is that it is the conduct of the accused that is examined to determine if a disturbance was caused. However each case has to be looked at individually to ascertain whether a disturbance was caused given the circumstances of the case.

(c) Power of Arrest to Prevent a Breach of the Peace; Section 31[225]

Section 31 of the Criminal Code gives a peace officer a power of arrest over someone breaching the peace or someone who on reasonable and probable grounds the peace officer believes is about to join in or renew a breach of the peace. In R v. Lefebvre[226] it was held by the County Court of Vancouver that section 31 was a preventive section of the Criminal Code. The actual common law offence of causing a breach of the peace was not contained in the Criminal Code, therefore nobody could be convicted of the offence. However under section 31 a police officer can arrest a person and detain him for up to twenty-four hours or bring him before a judge to have him bound over to keep the peace.[227] The provisions regarding twenty-four hours detention under the Criminal Code are now subject to challenges under section 9 of the Charter. Section 9 provides that everyone has the right not to be arbitrarily detained or imprisoned.[228]

If the citizen resists arrest under section 31 he can be charged with obstructing a police officer in the execution of his duty under section 118.[229] A conviction can ensue from a charge under section 118. The situation in R v. Lefebvre is thus similar to that in cases like Piddington v. Bates[230] in Britain. The police officer is given a wide discretion to decide whether conduct does or does not constitute a breach of the peace. If the person warned does not co-operate he can be arrested and convicted of obstructing the peace officer. However in Britain the police officer could actually charge someone with committing a breach of the peace under section 5 of the Public Order Act 1936.[231] The police officer also has a common law power of arrest for a reasonable apprehension, that there will be a breach of the peace.[232] Since section 5 of the 1936 Act was repealed a charge may now be made of disorderly conduct under section 5 of the Public Order Act 1986.[233]

In Hayes v. Thompson[234] police officers arrested the defendant for breach of the peace to prevent her from going back into a bar where she had been drinking. The defendant sued the police and won damages for false imprisonment. The decision was appealed and came before the British Columbia Court of Appeal. The court found that the important question was whether the police could arrest for an apprehended breach of the peace. Such a power is not included in the express words of section 31.

Hutcheon J.A. noted the British case of R v. Howell[235] where a common law power of arrest for an apprehended breach of the peace was upheld. He then referred to Knowlton v. R[236] which had been decided by the Supreme Court of Canada. In that case a defendant was arrested for walking in a prohibited area where a visitor from the U.S.S.R. was present. Hutcheon J. found that although the Supreme Court had not alluded to the common law power of arrest for an apprehended breach of the peace it was fair to infer that the legality of the arrest was based on that power.

Hutcheon J.A. proceeded to use the same method of analysis as used by the Supreme Court in Knowlton. He found that under the Royal Canadian Mounted Police Act[237] the police officers had the duty and obligation to preserve the peace and therefore the accompanying common law power to arrest for an apprehended breach of the peace. In this case Hutcheon J.A. found that the appellants had succeeded on the issue of law, but did not set aside the award of damages because the cost of a new trial would far outweigh those damages.

Thus, in circumstances such as those that occurred in the British case of Moss v. Mclachlan[238] the Canadian police would also have the power to arrest pickets on the way to a picket line for an apprehended breach of the peace. It is important to note however that section 31 of the Code does not provide for an offence of breach of the peace - only a power of arrest for breach of the peace. Once arrested the accused must be charged with an offence.

(d) Obstruction of a Peace Officer; Section 118[239]

The Supreme Court of Canada has held in R v. Moore[240] that obstruction of a peace officer in the execution of his duty does not have to be physical obstruction. There are many lower court decisions which give examples of conduct that will constitute obstruction including some decided in Alberta.[241] No distinction is made between destroying evidence, physically assaulting a policeman or refusing to move from a spot when requested to do so by a police officer.

The meaning of obstruction was further considered in the Alberta case of R v. Skead.[242] The case involved a procession of approximately thirteen native people through Calgary. The march had been refused a permit. The march took place in one lane of a four lane roadway. The police had insisted that the marchers stay on the sidewalk. The marchers were arrested and charged under sections 171 and 118 of the Criminal Code.

With regard to section 118 Cioni P.C.J. in the provincial court said that[243] "To compel a policeman to do his duty is not obstruction, to the contrary." Further he embraced the reasoning of an earlier decision of the Alberta Supreme Court[244] that a citizen is not[245] "...obliged to follow, blindly almost, any direction or order from a Police Constable, and that his failure to do so automatically leaves him liable for conviction for obstructing justice." Cioni P.C.J. found that the police had adequate power under the Highway Traffic Act and city by-law to deal with the marchers. The criminal intent of the marchers with regard to committing an offence under section 118 was not made out.

The reasoning in R v. Skead is not easy to follow as the judgment jumps quickly from point to point without adequate explanation. It appears that Cioni P.C.J. was quite concerned that the police had not acted fairly in the first place in refusing the march permit and was therefore concerned to acquit the defendants. In other cases under section 118 in Alberta, the power of the police to arrest has been widely defined.

In R v. Jarvie[246] the provincial court applied the ruling of the Supreme Court of Canada in R v. Knowlton[247] that the police were charged with general duties to preserve the peace under the Police Act of Alberta.[248] Piddington v. Bates[249] was considered in R v. Jarvie, as it was in R v. Lykkemark.[250] The latter case was also heard by Cioni P.C.J. who was later to decide R v. Skead. R v. Lykkemark involved two people who would not leave a party when asked to do so by the police. In upholding the conviction of one defendant under section 118 Cioni P.C.J. said as follows;[251] "I conclude that in law the general powers that a policeman has under the Criminal Code and the Police Act may be generally invoked by him to preserve order and peace and to protect citizens and property from criminal act or regulatory misfeasance." Thus enunciated the powers of the police to arrest can be wide enough to fit almost any situation.

(2) The Gainers Strike 1986

In chapter 3 it was shown how the miners strike, which occurred from 1984-5 in Britain, provided much information as to the type of criminal offences pickets were being charged with. The same type of information can, on a smaller scale be obtained from the strike at the Gainers meat packing plant in Edmonton in 1986. The strike was legal and involved a dispute over wages.

As was mentioned in a previous section of this chapter the civil injunctions issued in the Gainers case charged the police with the duty of enforcing the injunctions. As a result of the dispute approximately four hundred pickets were arrested.[252] Three hundred and fifty-eight of those arrests were made under the authority of the civil injunction. None of those arrested for breach of the injunction were tried. They were all released without being convicted.

Of the remaining people who were arrested, thirty-eight were charged with offences under the Criminal Code such as mischief, intimidation, causing a disturbance and obstructing a police officer in the execution of his duty. Thirty-six of these people were acquitted because of the lack of police evidence.[253] It is easy to draw parallels with the criminal cases against miners in Britain in 1986.[254] Many of the trials in those cases were discontinued because of the lack of police evidence.

The results of the criminal proceedings in both Britain and Alberta should raise questions as to how industrial disputes are policed.

The difficulties of the police in arresting a person in the situation of a crowded picket line are obvious. There are problems of identification, of recording evidence and of the process of arrest itself. Add to these problems the fact that trials may not occur until a year after the event when memories have often faded. However the police should be aware of a great responsibility when arresting citizens. The responsibility is to arrest only those who the police are reasonably sure have committed an offence. In other areas of life the police seem to be able to carry out this responsibility fairly well. Trials for wrongful imprisonment and malicious prosecution are not so common that the police procedures have to be called into question. However there does appear to be some difference in the case of industrial disputes where mass picketing takes place.

It is suggested that the role that the police plays in such disputes should be re-examined in the wake of the miners dispute in Britain and the Gainers strike in Alberta. In Alberta one judge did review one aspect of police conduct during the Gainers strike. Hope J. refused to order that pickets should be forced to sign an undertaking as a condition of release from police custody.[255] The undertaking was to state that the picket would stay away from the plant. This can be compared with the attitude of the Divisional Court in R v. Mansfield Justices ex parte Sharkey[256] where similar bail conditions imposed by a magistrate were upheld. The approach of Hope J. is more consistent with the principal that each case should be considered separately and not be judged in the light of conduct by other people.

(3) By-Law Offences

The Public Order Act 1986 in Britain now imposes a duty on those who wish to hold a public procession to give written notice to the police. The police may impose conditions on the procession or a public assembly.[257] A procession may even be prohibited entirely.

In Alberta the rules relating to meetings and processions are to be found in by-laws. This paper uses as an example Traffic By-Law 5590 of the City of Edmonton.[258] Breach of a city by-law is not an offence under the Criminal Code but a person who transgresses a by-law may be fined upon summary conviction in accordance with a schedule of fines.

The relevant sections of by-law 5590 are 102(22), 901, 404 and 405. these are set out in full in Appendix 2. Section 102(22) defines a parade as constituting over fifty people or over ten vehicles that are likely to block the highway.

Section 403 provides that no more than three people should stand together on a highway so that they obstruct passage or the entrance to buildings. Further no one person shall position himself on the highway so as to obstruct passenger or vehicular traffic. The fine under section 403 is $35.

Section 404 allows public meetings in certain areas of the city as long as sufficient room is left for traffic to pass. If sufficient room is not left a peace officer can request people to move. Section 405 allows people to watch parades that are authorized. The fine under sections 404 and 405 is $35.

Section 901 provides that anyone wishing to hold a parade or procession must apply to the Mayor or Council at least 48 hours beforehand for a permit. The application must include fairly specific details of the parade. A curious provision requires that no parade must move slower than 5 kilometers an hour. The fine for a breach of section 901 is $35.

In practice when the application is received by the Mayor's office it is referred to the Edmonton City Police Traffic Division. The sergeant who receives it fills out the administrative forms and refers the matter to the Deputy Chief of Police who approves or disapproves the application. The result is referred to the City Manager who has the final say to approve or disapprove the application. In practice the City Manager will endorse the police decision. The police then carry out the administrative tasks relating to the parade such as alerting the fire-brigade. The Chief of Police has an overriding discretion to cancel the permit at any time if the group wishing to hold the parade will not comply with any conditions.

Contrary to what may first appear to be the case upon reading section 901, it is really the police who decide what marches can be held and upon what conditions. The situation is thus similar to that as provided for in the British Public Order Act 1986. The Edmonton by-laws provide the police with further measures that can be used against public demonstrators such as pickets.[259]

V. Conclusion

In the period since 1980 the content of the Alberta Labour Relations Act with respect to picketing has changed little. One more group of employees, the hospital employees, were excluded from the provisions of the act relating to strikes and picketing in 1983.

The fact that more decisions of the Labour Relations Board are now reported makes it possible to compare the decisions with those of the courts. The Board and the courts share jurisdiction in the regulation of industrial disputes. The comparison shows that the Board is more inclined not to dwell on details of tortious liability. The approach of the Board concentrates to a great extent on the wording of the statute. An element of practicality pervades the Board's decisions and it seems to be implicitly recognized that the two parties to a dispute often have to co-exist once the dispute is over. By contrast the court decisions show a greater reliance on the principles of the common law in relation to tortious liability and the rules for granting interlocutory injunctions. Historically these common law principles favour the interests of the plaintiff in labour disputes. As well as following the common law the Alberta courts have not hesitated to extend it. In the Pacific Western Airlines[260] case it was held that when the interests of a third party are involved in a labour dispute, the plaintiff does not have to prove irreparable damage to receive his injunction.

Neither the courts nor the Labour Relations Board have interpreted section 114(1) to mean that all effective persuasive picketing is unlawful. Until the Ellis Don[261] case both forums interpreted section 114 in the same fashion. That is that section 114 did guarantee some positive right to picket as long as the picketing did not contravene section 114(2). In the Ellis Don case the Labour Relations Board introduced the element of intent to decide if section 114(2) had been contravened. It is suggested that it is unlikely that the courts will follow Ellis Don.

Due to the nature of the Canadian constitution it is unlikely that the Labour Relations Board will ever have sole jurisdiction over the regulation of industrial disputes. However the fact that there is an alternative forum that has experience in industrial dispute cases is not unimportant. Unfortunately cases which involve violent picket line scenes are more often taken at first instance to the courts where law is made that is just as applicable to peaceful picket lines. It seems that as a matter of course the courts will limit numbers on a picket line.

Information picketing continues to be excluded from the Labour Relations Act. However the extent to which such picketing will be permitted is not clear. In cases that would appear to be instances of information picketing, both the Board[262] and the courts[263] have enjoined the activity on the basis that someone was induced not to cross the picket line. As long as the actions of the pickets are judged by the results they achieve, the extent to which information picketing is permitted will be unclear.

The Supreme court of Canada has limited the protection of the Charter to labour disputes. It has held that the Charter does not apply to court orders such as injunctions[264] and does not for the most part apply to private litigation. Further, although picketing is a protected freedom as being freedom of expression, the limits on that freedom are to be measured by the terms of the relevant provincial legislation. On this reasoning purely informational picketing would not be protected under the Charter because it would arise in private litigation where neither party would be relying on government action as information picketing is not regulated by statute.

The Supreme Court also upheld the statutory prohibition on striking and therefore picketing by various groups of "essential" workers.[265]

The police in Alberta are able to arrest those on picket lines for a breach of the terms of a civil injunction. In addition many criminal offences from the Criminal Code are relevant to picketing. It is now clear that the police may arrest for an apprehended breach of the peace. Further even a bystander to a picket line can be convicted of mischief if he is found to be thereby assisting or encouraging in the obstruction of the use of the employers' property.[7] As in Britain, the criminal law takes no account of the fact that pickets may be merely practicing their rights in accordance with the civil statute.

In terms of the recognition and promotion of fundamental freedoms, Alberta is not much further forward than Britain in relation to industrial disputes. Even with a document such as The Charter of Rights and Freedoms fully entrenched into the constitution it has been shown that freedom of expression does not apply in the context of picketing. The pickets have to take their chances with the existing statutory and common law which limits expression on the part of pickets during a trade dispute so that it is virtually of no effect whatsoever.

FOOTNOTES - CHAPTER 5

1. Examples of employees that would be under Federal jurisdiction are Federal Government workers, airport workers.

2. R.S.A. 1980, c.L-1.1, s.105(1)(a). See Appendix 2.

3. R.S.A. 1980, c.L-1.1, s.87.

4. Ibid. s.90(1)(a).

5. R.S.A. 1980, c.L-1.1, s.114.

6. Ibid. s.8.

7. [1975] A.C. 396.

8. (1986) 43 A.L.R. (2d) 289.

9. Canada Act, 1982 (U.K.) c.11.

10. Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd. (1986) S.C.R. 573.

11. Alberta Union of Provincial Employees v. Attorney General of Alberta [1987] 3 W.W.R. 577.

12. (1985) 145 D.L.R. (3d) 385.

13. [1982] A.C. 173.

14. R.S.C. 1970, c.C-23.

15. (1983) 145 D.L.R. (3d) 385 at 394.

16. Ibid. at 399.

17. (1961) 28 D.L.R. (2d) 174.

18. [1948] 3 D.L.R. 178.

19. R.S.A. 1980, c.L-1.1.

20. Alberta Labour Amendment Act, S.A. 1974, c.38. The amendments related to the construction of oil sand plants.

21. Alberta Labour Amendment Act, S.A. 1977, c.77. The amendments made changes in collective bargaining in the construction industry.

22. R.S.A. 1980, c.L-1.1. See Appendix 2.

23. Ibid. s.105(1) No employee, bargaining agent or person acting on behalf of the bargaining agent shall strike or cause a strike
(a) while a collective agreement is in force between the bargaining agent and an employer or employers' organization.
(b) if a disputes inquiry board is established before a strike commences,
(i) until 10 days after the minister serves a copy of the recommendations of the disputes inquiry board on the parties, or
(ii) if the Board supervises a vote under section 102.2, until 72 hours after the Board notifies the parties of the results of that vote,
(c) within 30 days after the date of certification of the bargaining agent except where the employer is affected by registration, or
(d) if a notice to commence collective bargaining has been served pursuant to section 73(1) within 30 days after the date of certification of the bargaining agent, until 60 days after the date on which the notice was served.

24. Supra n. 22. s.117.1(1)(b).

25. S.A. 1983, c.34.

26. R.S.A. 1980, c.P-33.

27. R.S.A. 1980, c.L-1.1 s.1(1)(k)(ii).

28. Yellow Cab Ltd. v. Board of Industrial Relations et al. (1981) 24 A.R. 275 (S.C.C.).

29. Figures from the Department of Labour, Edmonton, as at Feb. 1987. In all, 114,500 workers are covered by legislation giving them a right to strike.

30. [1987] 3 W.W.R. 577.

31. Ibid. at p. 627.

32. R.S.A. 1980, c.P-33.

33. R.S.A. 1980, c.P-12.05.

34. A further point not noted by the Chief Justice but worthy of comment is that in negotiating on pay the fiscal policy of the Government also has to be taken into account.

35. [1974] 3 W.W.R. 481.

36. Ibid. at 486.

37. Supra n. 35.

38. Attorney General of Canada v. International Union of Elevator Constructors Local 12 et al. [1973] 1, W.W.R. 766.

39. 1974 (U.K.) c.52, s.15(2).

40. See Steel Brothers Canada Ltd. v. General Teamsters Local Union No. 362 Alta. L.R.B.R. 81-040A where Veit J. in reviewing a Board decision held that 'employee' in section 140(b) could include an employee of the trade union.

41. See Appendix 1.

42. Supra n. 35.

43. (1979) 13 A.R. 291.

44. Ibid. at 293-4.

45. [1976] 2 S.C.R. 200.

46. Ibid.

47. E.g. Maison Holdings Ltd. v. DY Chokum Unreported, 6 August, 1981, 212623 (Q.B.D. Alta.) where complicity in an illegal strike was alleged to be evidence of civil conspiracy.

48. See Linden Canadian Tort Law (1981) Chapter 7 at 179.

49. United Nurses of Alberta v. Attorney General of Alberta (1981) 25, A.R. 69 (C.A.).

50. Unreported, 12 April, 1978. [1978] A.U.D. 221.

51. Ibid.

52. Employment Code of Practice (Picketing) Order 1980 (S.I. 1980 No. 1757).

53. (1986) 43 A.L.R. (2d) 289.

54. Ibid. Laycraft C.J.A. at 298.

55. (1986) 43, A.L.R. (2d) 289 at p. 298.

56. Pacific Western Airlines Ltd. v. International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (1986) 45 Sask. R. 136.

57. Unreported decision of British Columbia Supreme Court, 31st December, 1985.

58. It is interesting that s.381 of the Criminal Code was not mentioned. By this time Canadian courts did not use this section in labour disputes. There is an argument that mass picketing is contrary to the provisions of s.381, based as it is on the 1875 Conspiracy and Protection of Property Act s.7 in England. See Bennion 'Mass Picketing and the 1875 Act' (1985) Crim. Law Rev. 64.

59. International Woodworkers of America, Local 1-207 v. Zeidler Forest Industries [1987] Alta. L.R.B.R. 31 at 37.

60. R.S.A. 1980, c.L-1.1, s.1(2). See also International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 146 v. Maloney Steel Ltd. [1987] Alta. L.R.B.R. 25, but note that this issue is currently on appeal to the Supreme Court of Canada in British Columbia Telephone Company v. Telecommunication Workers Union. [1985] C.L.L.C. 14, 059 (B.C.C.A.).

61. An employee still may be dismissed for just cause during a strike. See the discussion of this in International Woodworkers of America, Local 1-207 v. Zeidler Forest Industries Ltd. [1987] Alta. L.R.B.R. 31 at 44-58.

62. See Canadian Labour, Oct. 1986 at 16.

63. Unreported, 2nd June, 1986, 12647. See Edmonton Journal 3rd June, 1986.

64. Unreported 10th June, 1986, 12647. See Edmonton Journal 11th June, 1986.

65. Unreported 22nd July, 1986, 12647.

66. Ibid. Cavanagh J.

67. Unreported. 19th August 1986, 8603-19176.

68. Unreported. 19th June 1987, 8703-15152.

69. [1979] 1 S.C.R. 120.

70. Unreported decisions of 5th June, 1986, 13th June, 1986, 26th June, 1986, 19th August, 1986, 12809.

71. Unreported, 26th June, 1986, 12809.

72. Unreported, 19th August, 1986, 12809.

73. [1985] I.R.L.R. 136.

74. [1986] I.R.L.R. 337.

75. Thomas v. NUM [1985] IRLR 136 - the decision runs to 16 large pages. News Group Newspapers Ltd. v. SOGAT [1986] I.R.L.R. 337 - the decision runs to 17 large pages.

76. See Ch. 4 at p. 197.

77. 1974 (U.K.) c.52.

78. [1975] A.C. 396.

79. Bank of Montreal v. Calbox Properties Ltd. (1977) 4 A.R. 483.

80. (1985) 36, A.L.R. (2d) 137.

81. Ibid. Kerans J.A. at 145.

82. [1979] 3 All E.R. 624.

83. (1986) 43 A.L.R. (2d) 289.

84. Ibid. at 294.

85. Supra n. 82.

86. Supra n. 83 at 295.

87. Ibid.

88. Unreported 10th June, 1986, 12647.

89. Alberta Rules of Court, r. 702, 703, 704.

90. Tony Poje v. Attorney-General of British Columbia [1953] 2 D.L.R. 785, Retail, Wholesale and Department Store Union v. Prince Alberta Co-operative Association Ltd. [1984] 1 W.W.R. 421. See also Law Reform Commission of Canada, Report 17, 1982, Contempt of Canada.

91. Information provided by lawyer representing the union during the strike.

92. (1979) 13 A.R. 298.

93. Ibid. at 300.

94. See Can. Lab. 1986 at 17.

95. See Edmonton Journal 5/2/88 and 11/2/88.

96. Supra n. 92.

97. Unreported 16th February 1978, 99401.

98. See also two conflicting decisions arising out of the 1988 nurses strike as to notice of a Board directive filed with the court. Infra. Section 3(d).

99. Alberta Labour Relations Board, Informational Bulletin No. 2086 'Processing of Complaints Alleging an Illegal Strike or Lockout or Illegal Picketing'.

100. (1984) Alta. L.R.B.R. 072.

101. Ibid. at 6.

102. (1984) Alta. L.R.B.R. 072 at 6.

103. (1984) Alta L.R.B.R. 072 at 7.

104. Alberta Brewers' Agents Ltd. v. Alberta Union of Provincial Employees [1986] Alta. L.R.B.R. 384.

105. Ibid. at 386.

106. Alberta Brewers' Agents Ltd. v. Alberta Union of Provincial Employees, Local 50 et al. [1986] Alta. L.R.B.R. 401.

107. Ibid. per W. Canning (V.C.) at 405.

108. [1987] Alta. L.R.B.R. 307.

109. Ibid. at 310.

110. Supra n. 108 at 310.

111. Supra n. 108 at 311.

112. (1984) Alta. L.R.B.R. 072 - the case was not cited in Ellis Don.

113. (1956) 6 D.L.R. (2d) 326.

114. [1974] 3 W.w.R. 481.

115. [1986] Alta L.R.B.R. 384, [1986] Alta. L.R.B.R. 401.

116. [1987] Alta. L.R.B.R. at 312.

117. (1984) Alta. L.R.B.R. 072.

118. [1986] Alta L.R.B.R. 43.

119. [1986] Alta. L.R.B.R. 352.

120. Ibid. per G.A.Lucas Q.C. (V.C.) at 353.

121. [1974] 3 W.W.R. 481.

122. Supra n. 104 and n. 106.

123. (1984) Alta. L.R.B.R. 072.

124. [1987] Alta. L.R.B.R. 307.

125. *Calgary* v. *Calgary Civic Employees* (1979) 13 A.R. 291.

126. Supra n. 97 and n. 99.

127. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Pacific Western Airlines Ltd.* (1986) 43 A.L.R. (2d) 289.

128. *Pacal Blades of Canada Ltd.* v. *United Steelworkers of America* (1984) Alta. L.R.B.R. 072.

129. *Ellis Don Management Services Ltd.* v. *Sheet Metal Workers International Associations* [1987] Alta L.R.B.R. 307.

130. *Edinburgh Developers Ltd.* v. *Vanderlaan* [1974] 3 W.W.R. 481.

131. Information provided by Legal Counsel to the Labour Relations Board April 1988.

132. See e.g. *Varsity Engineering and Construction Ltd.* v. *Tunney* [1980] Alta D. 2149-01.

133. See e.g. S. Tacon *Tort Liability in a Collective Bargaining Regime* (1980) and P.C. Weiler *Reconcilable Differences* (1980), but cf. Carrothers. "Outlook on Labour Relations in Canada" (1983) 38 *Ind. Rels* 648 at 654.

134. Alberta Labour Relations Board Informational Bulletin No. 2086.

135. E.g. see the directives in *Combustion Engineering Canada Inc.* v. *International Brotherhood of Boilermakers and Welders, Local 146* (1987) Alta. L.R.B.R. 443 where the Board considered each aspect of the allegation of an illegal strike carefully.

136. Labour Relations Act R.S.A. 1980, c.L-1.1, s.142(5)(b)(ii) and (v).

137. R.S.A. 1980, c.L-1.1, s.142(7).

138. *Calgary General Hospital* v. *United Nurses of Alberta*. Unreported, 10th February 1988. Case No. 8801-01701.

139. *Fort McMurray General and Auxiliary Hospital* v. *United Nurses of Alberta*. Unreported, 10th February 1988. Case No. 8803-01611.

140. 1867 (U.K.) c.3.

141. [1981] 2 S.C.R. 220.

142. [1979] 2 S.C.R. 227.

143. See Appendix 2.

144. (1977) 77 D.L.R. (3d.) 581.

145. The sections of the Constitution which relate to the scope of the federal and provincial authority.

146. (1982) 21 Alta L.R. (2d.) 104.

147. Information provided by Legal Counsel to the Labour Relations Board, April 1988.

148. Canada Act, 1982 (U.K.) c.11. See Appendix 2.

149. S.C. 1960, c.44.

150. E.g. Robertson and Rosetanni v. The Queen [1963] S..C.R. 651. Note R v. Drybones [1970] S.C.R. 282 where the Supreme Court did use the Bill of Rights to strike down federal legislation.

151. See now Alberta Bill of Rights, R.S.A. 1980, c.A-16.

152. Although paradoxically some life has been breathed into the Federal Bill of Rights. See Singh v. Minister of Employment and Immigration [1985] 1 S.C.R. 177.

153. [1987] 3 W.W.R. 577.

154. See s.93. Public Service Employee Relations Act R.S.A. 1980 c.P-33 s.3 Police Officers Collective Bargaining Act. R.S.A. 1980. c.P-12.05, s.117.1-117.3 Labour Relations Act R.S.A. 1980, c.L-1.

155. Galligan J. in Re Service Employees International Union Local 204 v. Broadway Manor Nursing Home et al. (1983), 44 O.R. (2d) 392 at 409.

156. Public Service Alliance of Canada v. The Queen [1984] 2 F.C. 889.

157. [1984], 3 W.W.R. 481. See infra.

158. Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland (1985), 14 C.R.R. 193 (Nfld. S.C.T.D.).

159. Re Prime and Manitoba Labour Board (1983), 3 D.L.R. (4th) 74 (Man. Q.B.).

160. Halifax Police Officers and N.C.O.'s Association v. City of Halifax (1984), 11 C.R.R. 358 (S.C.N.S.T.D.).

161. [1970] A.C. 538.

162. [1984], 16 D.L.R. (4th) 359.

163. [1987] 3, W.W.R. 577 at p. 648.

164. P. Cavalluzo 'Freedom of Association and the Right to bargain Collectively' in Weiler and Elliot Litigating the Values of a Nation (1986) at p. 204.

165. Ibid.

166. Public Service Alliance of Canada v. The Queen [1984] 2 F.C. 8898 at 895.

167. Ibid.

168. [1987] 3, W.W.R. 577 at p. 646.

169. In 'The Regulation of Strikes and Picketing under the Charter' in Weiler and Elliot, Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986) at 226-7.

170. [1970] A.C. 538.

171. United National International Covenant on Economic, Social and Cultural Rights, 1966, G.A. Res. 2200 (XXI) A and United Nations International Covenant on Civil and Political Rights.

172. International Labour Organization, Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize, 67 U.N.T.S. 18 (1948).

173. Case No. 1247. See Edmonton Journal 15/11/85.

174. [1987] 3, W.W.R. 577 at p. 614.

175. Ibid. at p. 632.

176. (1962) 30 D.L.R. (2d.) 242. cf. A.G. of Canada v. Whitelock 73, C.L.L.C., 14,179.

177. R.S.B.C. 1960, c.384.

178. Supra n. 176 at 265.

179. (1984) 7 D.L.R. (4th) 609.

180. (1974) 43 D.L.R. (3d) 354.

181. Labour Relations Act, 1977 (Nfld.) c.64, s.124.

182. (1986) S.C.R. 573.

183. R.S.C. 1970, c.L-1.

184. [1984] 3 W.W.R. 481. Per Hutcheon J.A.
'The interim injunction was granted before any picketing took place. The proper assumptions to be made are that the picketing would be peaceful, that some employees of Dolphin Delivery and other trade union members of customers would not cross the picket line, and that the daily business of Dolphin Delivery would be disrupted to a considerable extent.'

185. Adopted by McIntryre J. in the Supreme Court (1986) S.C.R. 573 at p. 582.

186. Hutcheon J.A. rejected the application of the tort of conspiracy to injure as having no foundation in the law of British Columbia. It had been repealed in 1959. Now see s.89 Labour Code R.S.B.C. 1979, c.212.

187. The issue of who the Charter applied to had been much debated by constitutional lawyers. See for example D. Gibson "Distinguishing the Governors from the Governed; the meaning of Government under section 32(1) of the Charter" 13 Man.L.J. 505, K. Swinton 'Application of the Charter of Rights and Freedoms' in W. Tarnopolsky and G. Beaudouin The Canadian Charter of Rights and Freedoms-Commentary (1982) at p. 41.

188. See Appendix 2.

189. See Appendix 2.

190. (1986) 26 D.L.R. (4th) 728.

191. S.O. 1981 c.55.

192. Ibid.

193. (1986) S.C.R. 573 at 588.

194. (1986) S.C.R. 573 at 591.

195. (1986) S.C.R. 573 at 592.

196. Ibid.

197. See D. Beatty "Constitutional conceits: The Coercive Authority of Courts" (1987), 37 U. of T.L.J. 183, B. Slattery "The Charter's Relevance to Public Litigation: Does Dolphin Deliver" (1987) 32 McG.

L.J. 905. K.D. Ewing and T.J. Christian "Labouring under the Canadian Constitution" [1987] C.L.J. 195.

198. J. Fudge "Secondary Picketing and Freedom of Expression in Canada" (1987) 16 I.L.J. 188.

199. (1962) 30 D.L.R. (2d) 242.

200. S.C. 1970 c.C-34. See Appendix 2.

201. (1983) 9 C.C.C. (3d) 85.

202. Ibid. at 89.

203. (1983) 9 C.C.C. (3d.) 85 at 90.

204. [1974] A.C. 587.

205. Unreported. Prov. Ct. Dec. 15 1987. 870720.

206. Ibid. at p. 9 of decision.

207. Supra n. 205 at p. 3 of decision.

208. See Appendix 2.

209. See e.g. Poole v. Tomlinson (1957) 118 C.C.C. 384 and R v. Swinimer (1978) 3 C.R. (3d) 165.

210. (1971) 14 C.R.N.S. 179.

211. (1980) 56 C.C.C. (2d) 99.

212. Supra n. 210.

213. Supra n. 210.

214. (1982) 27 C.R. (3d) 246.

215. Ibid. at p. 255.

216. (1982) 19 Sask. R. 64.

217. (1978) 3 C.R. (3d) 165.

218. Mysak v. R (1982) 30 C.R. (3d) 386.

219. Ibid. at p. 393-4.

220. [1984] 4 C.N.L.R. 108.

221. The judge cites R v. Rogers (District Court of Calgary 22/6/79 and R v. Podridske (Court of Queen's Bench) 23/4/80.

222. Supra n. 209 at p. 120.

223. Per Mackeignon C.J.N.S. in R v. Swinimer (1978) 3 C.R. (3d) 165.

224. See Also R v. Starlight [1980] 4 W.W.R. 310.

225. See Appendix 2 for text of section 31.

226. (1982) 1 C.C.C. (3d) 241.

227. S.C. 1970, c.C-34, s.452.

228. See e.g. R v. Williamson (1986) 68 A.R. 130.

229. See e.g. R v. Yehl (1964) 44 D.L.R. 504.

230. [1961] 1 W.L.R. 162.

231. 1936 (U.K.) 1 Edw. 8 and 1 Geo. 6, Ch. 6.

232. R v. Howell [1981] 3 All E.R. 383.

233. 1986 (U.K.) c.64.

234. [1985] 3 W.W.R. 366.

235. Supra n. 232.

236. (1973) 21 C.R.N.S. 344. Note however R v. Biron (1976) 23 C.C.C. (2d.) 513 where Laskin C.J.C. dissents on the basis that section 31 is not an arrest power.

237. R.S.C. 1970, c.R-9, s.15 and s.18.

238. [1986] I.R.L.R. 76.

239. See Appendix 2 for text of section 118.

240. (9179) 43 C.C.C. (2d.) 83.

241. See e.g. R v. Jarvie (1981) 18, Alta. L.R. (2d) 36.

242. [1984] 4 C.N.L.R. 108.

243. Ibid. at p. 120.

244. R v. Ure (1976) 6 A.R. 193.

245. Supra n. 242 at p. 121.

246. (1982) 18 A.L.R. (2d) 36.

247. (1973) 21 C.R.N.S. 344.

248. R.S.A. 1980 c.P-12, s.31(1). See Appendix 2.

249. [1961] 1 W.L.R. 162.

250. (1982) 18 A.L.R. (2d.) 48.

251. Ibid. at p. 56.

252. Information from lawyer representing the union during the strike.

253. For cases involving more serious offences see *R* v. *Gomez* (1987) 76 A.R. 386 and *R* v. *Thibeault* (1987) 76 A.R. 380.

254. See Chapter 3.

255. See Edmonton Journal 4/6/86.

256. [1984] I.R.L.R. 496.

257. 1986 (U.K.) c.64, s.11.

258. Ibid. s.12-13.

259. For Calgary see Traffic Bylaw 9022. See Appendix 2 for relevant sections of Edmonton By-law 5590.

260. *International Union, United Automobile Aerospace and Agricultural Implement Workers of America* v. *Pacific Western Airlines* (1986) 43 A.L.R. (2d) 289.

261. Supra n. 129.

262. *Pacal Blades of Canada Ltd.* v. *United Steelworkers of America* (1984) Alta L.R.B.R. 072.

263. *Edinburgh Developers Ltd.* v. *Vanderlaan* [1974] 3 W.W.R. 481 is arguably a case of information picketing.

264. *R.W.D.S.U.* v. *Dolphin Delivery* (1986) S.C.R. 573.

265. *A.U.P.E.* v. *Attorney General of Alberta* [1987] 3 W.W.R. 577.

CHAPTER 6

CONCLUSION

(1) To What Extent is the Legislative and Judicial Restriction of Picketing in Britain and Alberta Similar?

In chapters two and four of this paper it was demonstrated how the regulation of picketing in both Britain and Canada was originally a matter of criminal law. Section 381 of the Criminal Code[1] and section 7 of the Conspiracy and Protection of Property Act 1875[2] are virtually identical in terms. Section 7 of the 1875 Act does not contain a peaceful picketing proviso any longer, but it is generally accepted that the positive terms of section 15 of the Trade Union and Labour Relations Act 1974[3] will provide protection from prosecution under section 7, if the picketing is in accordance with section 15.[4] Both section 7 of the 1875 Act and section 381 of the Criminal Code have been subject to differing interpretations as to the degree of conduct by pickets necessary to constitute a breach of the statutes. The issue has been more widely debated in Britain where section 7 has been used more often as a basis of civil liability than section 381 has in Canada and recently section 7 has become important once again for criminal prosecutions.[5]

The debate turns on the issues of firstly, whether the offences enumerated in sections 7 and 381 are illegal per se[6] or whether a separate unlawful act is necessary[7] and secondly, what degree of conduct will make picketing a nuisance. With regard to the first issue the widely held academic opinion is that a separate unlawful act is necessary for conduct to constitute a statutory offence but the British Court of Appeal held otherwise in Hubbard v. Pitt.[8] As to the second issue the Supreme Court of Canada held in Aristocratic Restaurants v. Williams[9] that peaceful picketing was not a nuisance. However subsequent cases have considerably reduced the importance of the Aristocratic case so that the issue is once again clouded. In Britain new species of nuisance have been judicially developed as in the case of Thomas v. N.U.M..[10] The new tort of harassment is sufficiently wide to cover peaceful picketing to persuade someone to work or not to work so that the relevance of a peaceful picketing proviso is limited in any event.

As mentioned above the peaceful picketing proviso to section 7 of the 1875 Act is now contained in section 15 of TULRA.[11] Picketing within section 15 is however only protection against those forms of civil liability which are not actionable under section 13 of TULRA. Section 13 provides that in certain circumstances inducing breach of contract and interfering or inducing another to interfere with the performance of a contract are not actionable. This is the way in which the British system of trade union liability operates. Certain forms of tortious liability were developed at common law to make trade unions liable and the statutes gave immunity in certain circumstances from those types of action. Since 1980 the scope of protection afforded by statute has considerably diminished and the common law is reclaiming lost ground.

In Canada collective bargaining statutes closely regulated the conduct of trade unions and their members after World War II. Before this time however there had been a great reliance on the common law to regulate the conduct of strikers and pickets and a good deal of jurisprudence was drawn from Britain. Actions for inducing breach of contract, conspiracy and intimidation were commonplace in the field of labour disputes. After the adoption of regulatory collective bargaining statutes a new cause of action arose in Canada - that of breach of the labour relations statute itself. The breach of the labour relations statute constitutes the illegal means necessary to commit for example the tort of inducing breach of contract. The common law is thus still important in the imposition of liability. In Alberta it has never been enacted that breach of the labour relations statute is sufficient to find a trade union liable at civil law without an attendant tort. Those sections of the Labour Relations Act[12] relating to strikes and picketing contain penal provisions so that a civil action is in a sense based on a criminal offence. Common law torts thus continue to be used in Alberta and ensure some continuing similarity with British cases. It is true to say however that in most respects the common law torts are not developed into such sophisticated forms as they are in Britain in relation to industrial disputes. However once different forms of tortious actions are developed by British judges, the Canadian judges will often use them.

In modern times the British labour relations statutes have become more regulatory and all-encompassing. Section 15 of TULRA regulates picketing as does section 114 of the Alberta Labour Relations Act. Both sections limit picketing in terms of location. A Code of Practice on the Conduct of Picketing[13] now ensures that picketing in Britain is limited as to the numbers that may picket. In Alberta there is no such code but the judges are willing to limit the numbers of pickets anyway. A different approach to the cases is shown by the Labour Relations Board in Alberta but its approach is limited by the terms of section 114 and by the fact that its decisions can be judicially reviewed by the courts. In one recent case the Board has suggested an alternative approach to section 114 by looking at the intent of the pickets.[14] It remains to be seen what effect, if any, the case of Ellis Don will have.

The terms of section 114 arguably prohibit anything but information picketing in a trade dispute. It could be argued that effective persuasive picketing automatically involves the commission of an act that is otherwise unlawful in that it involves the tort of inducing breach of contract. The courts however have not interpreted the section in that fashion, save in the situation of multi-employer sites where pickets are said to cause illegal strikes by employees who will not cross picket lines. Even where picketing appears to be informational in character the courts and the Labour Relations Board will judge the picketing by the results it achieves. So if one person will not cross the picket line it will be judged to be persuasive and illegal.[15] Information picketing outside of a trade dispute situation would be judged by the standard of the common law torts.

In Britain information picketing outside of a trade dispute situation was held to be a nuisance in *Hubbard* v. *Pitt*.[16] Within a trade dispute situation the conduct of all picketing, informational or otherwise will be judged by the terms of section 15 of TULRA.

It was submitted in the introduction to this thesis that to be effective picketing must involve the element of persuasion as well as the communication and obtaining of information. The fact that a person has been persuaded not to cross a picket line can be viewed as a result of the picketing activity. The courts will often look to the result and equate it with the purpose of the pickets. The pickets may therefore in fact on one view be merely practising the communication and obtaining of information. The picketing may nevertheless be enjoined because another person has made up his mind on the basis of that information, not to cross the picket line. The tort of inducing breach of contract will be applied in that situation, so that the tort will always operate to prevent effective picketing.

It is therefore submitted that the relevant statutes should provide for the exclusion of liability for the common law torts, and in particular the tort of inducing breach of contract. The statutory provisions should be worded in such a way that there is as little chance as possible of judicial escape from the terms of a statute by means of a phrase such as "in contemplation or furtherance of a trade dispute". In Alberta it should be specifically provided by statute that failure to cross a picket line does not constitute an illegal strike.

The number of pickets should not be regulated by statute. Picketing occurs in vastly different circumstances and is directed towards businesses which may all be very different in terms of size and method of operation. To state that six is an appropriate number in all cases immediately reduces the effect of the majority of picket lines. A preferable alternative might be to place a duty on trade union officials to consult with the police beforehand if it is anticipated that a picket line would exceed more than twenty in number. In practice trade union officials often do this in any event and in Britain they are obliged to under the terms of the Public Order Act 1986. It should be stressed that the role of the police would not be to minimize the disruption to the employer, but to ensure that the picketing is carried out safely.

If a picket line is to consist of less than twenty people then it is submitted that there should exist a positive right for pickets to stop vehicles for a short time to talk to those inside. The Donovan Commission rejected such a proposal because it would be too hard to implement. However it is difficult to see why this would be so. If the numbers were as small as twenty or less the number of police required would be far less. It may be that trade unions would be willing to exchange a large scale demonstration for the right to stop vehicles and talk directly to those doing business for and with the employer, with no fear of being penalized if anyone is thereby persuaded not to cross the picket line. As has been pointed out in the thesis many picket lines do already operate in such a fashion with the co-operation of the police. This practice should be sanctioned by statute.

The tool used by plaintiff employers in Britain and Alberta to restrict picketing is the interlocutory injunction. The rules for granting such injunctions are completely within the discretion of the judiciary. In Britain it is provided that judges should have regard to the possibility of the defendants maintaining a successful statutory defence at trial.[17] Once however the judges have "had regard" to this factor they can disregard it if they like.

The common law rules in Britain and Alberta for granting interlocutory injunctions direct only that the plaintiff must show there is a serious issue to be tried.[18] Such a rule is unsuitable for application to cases of labour disputes. In such cases there is a direct conflict between two groups of people about terms and conditions of employment which is always a serious issue. The rule will thus always apply to the advantage of the plaintiff as the injunction will be granted. In many cases judges will also raise the question of the public interest. Not the public interest in industrial democracy, but the public interest in being deprived of a service such as a newspaper[19] or of not being inconvenienced at a public facility such as an airport.[20] It is suggested that unless there is the possibility of some real danger to the public, the question of the public interest should be kept out of labour disputes.

Once an injunction is imposed to limit picketing in both Britain and Alberta, industrial disputes are very often brought to a halt. The employer has the full weight of the statute and the judicial machinery behind him, so that if a court order is breached, expensive penalties result for the unions.

It is submitted that the method of and reasons for imposing interlocutory injunctions are unsuitable for application to cases involving labour disputes. The reasons for imposing interlocutory injunctions have largely been developed in areas of law that bear no relation to the law of labour relations. In other areas of laws there is usually some justification for maintaining the status quo pending trial. In the case of a labour dispute there will rarely be a trial after an injunction is imposed and so it cannot be said that the rationale for imposing an interlocutory injunction exists.

It is suggested that the proper forum for the resolution of industrial disputes is a specialized tribunal such as the Labour Relations Board. As has been shown the Board is more willing to apply the terms of the statute to see if it has been breached, rather than discussing matters such as the balance of convenience. The courts are bound by their own precedants and it is time to recognize that issues relating to labour disputes require different treatment. It is further suggested however, that matters of contempt are still appropriate to be dealt with by the courts as contempt is a separate offence and should be treated as such.

To add to the weight of the civil law, the criminal law in Britain and Canada is also used to restrain pickets. As well as the offences under section 7 of the 1875 Conspiracy and Protection of Property Act and section 381 of the Criminal Code there are numerous other relevant minor offences. Duplicated to a great extent in the criminal laws of both jurisdictions are offences of obstruction of the highway, committing a breach of the peace, obstructing a police officer in the execution of his duty and criminal damage. More serious offences are riot and unlawful assembly. Acting within the confines of the civil law is no defence to a criminal charge, except as already mentioned in the cases of section 7 of the 1875 Act and section 381 of the Criminal Code. The police in Britain and Canada have considerable discretion as to when to make an arrest in relation to the above mentioned offences and numbers on a picket line can thus be considerably reduced by use of the criminal law. Under the terms of the Public Order Act 1986[21] in Britain the police now have the powers to make conditions for the holding of a public assembly which could effectively remove any positive effects of picketing.

To take into account the suggested changes outlined above to the civil statutes in relation to picketing the criminal provisions with regard to watching and besetting should be abolished. If pickets were to be given a positive right to persuade then the watching and besetting provisions would be superfluous. With regard to other criminal offences that apply to pickets it is difficult to justify the exclusion of a group of the population from the operation of the criminal law. However, it is suggested that there is some justification with regard to the offence of obstruction of the highway. It is entirely contradictory to a positive right to picket for the police to be able to arrest a picket for obstruction of the highway. It may be that some distinction would have to be made between the road and the pavement or sidewalk, so that pickets could attend on the latter, but not on the former. If trade union officials had consulted with police before mounting the picket line it might be that a means of identification could be established for pickets such as a coloured armband.

Understandably trade unionists have in the past mistrusted any method of identification for fear of arrest or a civil suit. However it has to be accepted that many troublemakers join picket lines who are not authorized by the union and cause many problems. If there was greater co-operation between the police and pickets, the police may then be able to direct their attention towards these other elements.

One further change in the criminal law should be to establish that there should be some degree of proximity between an apprehended breach of the peace and the place where a police officer arrests a suspected offender. It is according too much discretion to the police to allow them to arrest people as much as one hundred miles away from the scene of a suspected breach of the peace.

It can thus be seen that the effect of statutory and judicial restriction of picketing in modern day Britain and Alberta is very similar despite quite different collective bargaining regimes. In part this is due to the fact that picketing was originally regulated by the common law in both jurisdictions. Even since picketing has been defined by statute, the activity has never been totally regulated by statute. The common law is still playing a role in shaping the limits of permissible picketing. Another factor is the general perception of law makers in Britain and Alberta of exactly what picketing is. It is not viewed as a form of expression by workers which is their predominant method of publicising their cause. Rather it is viewed as an irritant and as an activity that is disruptive of traditional economic values. Mass pickets are viewed as inherently wrong whether violent or not. The principles of freedom of assembly and freedom of expression are compromised.

The changes that have been suggested above are a starting point for discussion using an alternative perspective to the traditional legal view of picketing. Trade unionists would possibly view the proposed degree of co-operation with the police as naive. It is agreed that much would depend upon the view taken by the police of their role, which as already suggested, should not be to minimize disruption to the employer but to avoid serious public disorder. It would be hoped that by establishing a positive right to picket the distorted view that the traditional legal perspective takes of picketing would be subtly altered so as to affect all those involved in the conduct of an industrial dispute. Before referring back to the fundamental freedoms mentioned in the introduction to this paper, it is important to consider proposed legislative changes in Britain and Alberta to see if current trends are endorsed or reversed.

(2) Proposed Legislation

(a) Britain

The Government in Britain has now published a Green Paper[22] and an Employment Bill based on the Green Paper. The Green Paper is entitled 'Trade Unions and Their Member's. As the title suggests the new Bill is concerned with the rights of trade union members. The aims of the new measures are expressed thus;[23]

> It is the view of the Government that, having embarked on the process of giving proper and effective rights to union members, it should ensure that those rights are fully developed so that they provide the ordinary member with the effective protection that he or she is entitled to enjoy in a free society.

In reality the bill is an attempt to alienate trade union members from their unions and encourage divisive action. In an era when collective action is not supported by the public as it was thirty years ago, the bill will probably receive considerable support. It is to be hoped however that those who support the bill will take a closer look at its clauses and note the significant changes that it will make to the democratic way in which trade unions run their affairs from within.

For example clause one of the bill allows an individual member to apply to court when his union proposes to take some kind of industrial action without a ballot that would have the effect of inducing members to break their employment contracts. If the court is satisfied as to the member's application it can order the union to cease the action.

As was noted in chapter 3, the Trade Union Act 1984[24] provides that if unions do not hold a ballot before taking industrial action they will lose their tortious immunities for the results of that action. Further, many administrative details have to be complied with by the union before the ballot can be declared to be legal. These provisions in the 1984 Act are penalty enough without adding the divisive measure of allowing a union member to take action against the union.

In a response to the Green Paper the Trades Union Congress has been quick to point out the problems with the reasoning of the Government.[25]

> The facts of trade union life are that unions often have to take hard, finely balanced and closely contested decisions (for example, whether to accept an offer, whether to take industrial action, who to elect to union office). These decisions are taken by votes rather than by someone exercising autocratic power (in marked contrast to employers). There is frequently a minority who intensely disagree with the majority. Yet the tradition of democracy is that minorities abide by the decisions of the majority. If this principle is substantially undermined as far as unions are concerned - and this appears to be the Government's aim - then it becomes difficult for unions to act in a coherent, consistent and reliable way.

Clause three of the bill gives a union member the right not to be unjustifiably disciplined by his union. The clause goes on to set out the circumstances when a member is unjustifiably disciplined. The first mentioned is when a member has failed to participate in any strike or other industrial action. In effect the clause gives a legal sanction to strike break. In response to this clause the T.U.C. has pointed out[26] that it is also undermining the democratic nature of most trade unions. If the majority vote to strike the minority has to abide by that rule. If minorities can decide not to strike and be upheld in that decision, does it also mean that they can strike if the majority decide not to? The proposed legislation would not appear to give the minority in favour of strike action a right to complain to an industrial tribunal as it does to the minority who might vote against strike action. The terms of the bill are therefore selective and undemocratic. The purported rights that the bill grants to trade union members are in reality means whereby trade union actions are undermined.

The bill provides for individuals to make complaints against their unions in other circumstances apart from industrial action. The industrial tribunal is given the power to award compensation to the member[27] so that there will certainly be an incentive for the member to make such a complaint. Further, clause 18 of the bill provides for the appointment of a Commissioner for the Rights of Trade Union Members. A member of a trade union who wishes to make a complaint against his union can apply to the Commissioner for financial assistance to pursue the complaint.

Thus the minority member of a trade union can use public funds to pursue an action against his union and if successful will be awarded compensation. Public funds will presumably also bear the burden if the complainant loses his case. It is regrettable that the Government views as a priority the allocation of money to support those in the minority of a trade union after a democratic vote has been held. A more deserving cause would be financial aid to those employees injured at work due to the negligence of their employers. Such employees rarely meet the qualifications for legal aid and most either rely on their unions or their own resources to bring a court action.

For the foreseeable future it is unlikely that the tenor of British legislation with regard to industrial conflict will change. Even if a Labour Government came to power it is unlikely that the legislative position will revert to where it was in the 1970s. The continued trend as evidenced by the new bill is not to outlaw industrial action completely, but to make it so difficult and prohibitive financially to pursue, that to all intents and purposes it will be outlawed.

(b) Alberta

In Alberta there are also proposals for new legislation. A new labour code has been presented in the form of a bill[28] and as a prelude the Construction Industry Collective Bargaining Act was passed in June 1987.[29] The Act is an indication of the tenor of the legislation as proposed in the Labour Code. It provides for collective bargaining negotiation to be carried out under the direction of the Minister. If the bargaining breaks down the Minister may refer the dispute to a construction industry dispute resolution tribunal.[30]

The award of the tribunal is binding on the parties and while the tribunal is considering the matter there can be no strikes or lockouts. So although the ability to take a strike vote is enshrined in the Act,[31] it is hard to see when a strike could be held. Presumably a strike vote would be held because of a dispute, but if there is a dispute the Minister can refer the matter to the tribunal and there can be no strike. The trend in Alberta legislation of limiting the right to strike and therefore to picket is thus continued.

Bill 22[32] which contains the proposals for the new Labour Code excludes from its provisions those same employees who are excluded from the present Labour Relations Act. Thus members of certain professions are excluded, police officers, public servants, farm employees and domestic employees.[33] Firefighters and hospital employees are specifically denied the right to strike and therefore picket.[34]

For those employees who are covered by the proposed legislation there are still the requirements of a strike vote[35] and strike notice[36] before industrial action can occur. With regard to picketing the new section 81 reads as follows

> 81(1) Subject to subsection(2), during a strike or lockout that is permitted under this Act anyone may, at the striking or locked-out employees' place of employment and not elsewhere, in connection with any labour relations dispute or difference and without acts that are otherwise unlawful, peacefully engage in picketing to persuade or endeavour to persuade anyone not to
>
> (a) enter the employer's place of business, operations or employment,
>
> (b) deal in or handle the products of the employer, or
>
> (c) do business with the employer.

> (2) On the application of any person affected by the strike or lockout the Board may, in addition to and without restricting any other powers under this Act including the powers of the Board with respect to section 151,
>
> (a) determine whether any premises are the place of employment for the purposes of subsection(1), and
>
> (b) regulate persons and trade unions who act in respect of activities under subsection(1) and by order declare what number of persons may act under that subsection, determine the location and time of that action and make such other declarations as the Board considers advisable.
>
> (3) When the Board makes a determination or order under subsection(2) it shall consider the following:
>
> (a) the directness of the interest of persons and trade unions acting under subsection(1),
>
> (b) violence or the likelihood of violence in connection with actions under subsection(1),
>
> (c) the desirability of restraining actions under subsection(1) so that the conflict, dispute or difference will not escalate, and
>
> (d) the right to peaceful free expression of opinion.
>
> (4) Expect in accordance with subsection(1) and any determination or order of the Board under subsection(2), no person shall in connection with a labour relations dispute or difference engage in picketing.

Before looking at the differences between the proposed new section and the present section 114 it is worthwhile to point out the similarities. With the retention of the words "without acts that are otherwise unlawful" in section 81(1) it is still arguable that the section prohibits all effective persuasive picketing during the course of a trade dispute because such picketing involves doing an unlawful act. A second point is that purely informational picketing is still outside of the terms of the new section. However the courts may still measure the legality of the picket line by the results it achieves. If one person refuses to cross the picket line it may be held to be unlawful within section 81(3) or even section 81(4).

Initially section 81 was framed in almost identical terms to section 114. A significant difference was that section 81 limited the persons who could picket to those "with a direct interest in the dispute." As a result of opposition to Bill 22 as a whole and section 81 in particular, the latter proposal was amended in June 1988.[37] The new proposal is as set out above.

Some new phrases are present. The picketing must be "in connection with any labour relations dispute or difference." This phrase brings to mind the phrase used in British statutes of "in contemplation or furtherance of a trade dispute." It remains to be seen whether Alberta jurisprudence will develop as to the meaning of "labour relations dispute or difference." Picketing must also be engaged in "peacefully". Exactly what conduct this adjective will outlaw also remains to be seen. It may be used to limit shouting and the calling of names such as "scab."

Subsection(1) is expressed to be subject to subsection(2) which is a new provision. Subsection 2 provides that anyone affected by the strike or lockout can apply to the Board of Labour Relations for a directive as to who may picket, in what numbers and at which time. Subsection(3) provides that the Board must take into account the directness of interest of those picketing, any violence or the likelihood of violence, the desirability to restrain picketing so as not to escalate the conflict and the right to peaceful free expression of opinion.

It is timely that such applications to the Board are reinforced by the new subsection. However it has to be remembered that the courts will still have the jurisdiction to deal with cases in relation to picketing and some employees will still prefer to take their case there. As has been shown by the cases the Labour Relations Board could previously give directives in relation to picketing and all that is new is that the subsection spells out what considerations the Board must take into account. Even so the Board is still constrained by the terms of section 81 which is in essentially the same terms as the present section 114.

Subsection(4) provides that no picketing shall occur other than in accordance with subsection(1) or a Board directive. The second limb of section 114 is thus preserved and the law as enunciated in Edinburgh Developers[38] will remain intact. It is noteworthy that the creators of Bill 22 have not deemed it to be appropriate to outlaw the common law torts and provide that breach of the labour code may alone provide a cause of action. It is suggested that this would have been an excellent opportunity to review this aspect of the law. Introducing simple statutory sections to replace the use of the cumbersome economic torts would have clarified the law greatly.

Section 82 of Bill 22 contains the former section 140 of the Labour Relations Act relating to refusal to work and take delivery of goods. It is unchanged.

Section 83 specifically sets out the powers of the Board to deal with unlawful strikes. It provides as follows.

> 83. Where the Board is satisfied that
> (a) a trade union called or authorized or threatened to call or authorize an unlawful strike,
> (b) an officer, official or agent of a trade union counselled, procured, supported or encouraged an unlawful strike or threatened an unlawful strike,
> (c) employers engaged in or threatened to engage in an unlawful strike,
> (d) any person has done or is threatening to do any act and the person knows or ought to know that, as a probable and reasonable consequence of that act, another person or persons will engage in an unlawful strike, or
> (e) a trade union, employee or other person has contravened section 81 or 82,
> the Board may in addition to and without restricting any other powers under this Act, so declare and may direct what action, if any, a person, employee, employer, employers' organization or trade union and its officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or threat of an unlawful strike or the contravention of section 81 or 82.

The first point to note is that section 83 does not appear to require the application of a party before it acts under section 83. A question may therefore arise as to whether the Board will have a duty to act when notified of an act within section 83. A second point is the wide terms of section 83. It includes threats to strike and the encouragement of an unlawful strike by a trade union official. Section 83(d) is directed towards multi-employer site picketing and endorses the result in Edinburgh Developers. The wide terms of the subsection also prohibit such a finding as was made by the Board in the Ellis Don[39] case - that if the pickets did not intend to cause an illegal strike by others, they were not in breach of the statute. If section 83 is enacted, the fact that the pickets knew that an illegal strike would be caused will be a sufficient basis upon which to prohibit the picketing. Knowledge can be imputed to the pickets.

Section 88 of Bill 22 attempts to direct that parties in an industrial dispute should use the Board rather than the courts.

> 88. No court shall grant any injunction or other process that has the effect of restraining a strike or lock-out or restraining or limiting picketing in respect of a labour dispute to which this Act applies unless
>
> (a) there is a reasonable likelihood of danger to persons or property or
>
> (b) resort to the Board is impractical in the circumstances, in which case the court may issue an order, which shall remain effective until such time as the Board is able to determine the matter.

It will be interesting to see how this section works in practice. It may be that it will be challenged as the terms may be seen as giving the Board section 96 powers. However the jurisdiction of the court is not ousted completely. Insofar as the section attempts to direct more cases towards the Board it is to be welcomed. As already stated in this paper the Board is better equipped to deal with labour dispute cases.

The sections of the present Labour Relations Act relating to judicial review of Boards' decision and the imposition of injunctions after ex-parte hearings remain essentially unchanged in Bill 22.

In most respects therefore the contents of Bill 22 in relation to picketing continue the trend set by previous legislation. The only real difference is that the proposals promote that parties should resort to the

Labour Relations Board rather than the courts. It has been suggested in this paper that the Board is better equipped to deal with cases of labour disputes. However the Board is still constrained by the terms of the statute and the jurisdiction of the courts cannot be ousted. Some employers will still prefer to use the courts.

(3) Picketing and the Fundamental Freedoms

In the introductory chapter to this paper it was noted how Britain and Canada had ratified international conventions endorsing the principles of freedom of expression and freedom of assembly. How far can these freedoms be said to be being upheld in Britain and Alberta in relation to picketing in the course of a labour dispute? In practice there is an extremely limited adherence to the principles of freedom of expression and assembly. In both jurisdictions picketing is limited by statute, both civil and criminal, and by the common law.

Outside of the circumstances of a trade dispute it seems that in Britain at least, the principle of freedom of expression is expendable. Stamp L.J. remarked in Hubbard v. Pitt[40] that

> I only observe, because no argument was addressed to the court in this regard, that the temporary interference with the right of free speech which might be affected if in the end it turned out that the derogatory material was true might be regarded as minimal when weighed against the damage wrongly done to the plaintiff's business pending the trial if in the event the derogatory material turns out to be defamatory and untrue.

Freedom of assembly is regulated in Alberta by city by-laws administered by the police and in Britain by the restrictive terms of the Public Order Act 1986[41] which is also administered by the police. On some occasions picket lines do operate with the co-operation of the police. The police will even stop cars and buses for pickets to make their case.[42] However the cases which make law are usually those where violence is involved, where mass pickets are present or where the police are clearly being over-zealous in the exercise of their duties. The law made from such cases is then applied in practice and a vicious circle is created into which principles of freedom of expression and assembly simply disappear. The circle is reinforced by statutes enacted in ever more restrictive terms.

One commentator has suggested[43] that the above result arises from the fact that the law-makers continually view picketing from a purely legal perspective which favours the interests of the employer in a trade dispute. Those interests are the continuance of production and protection of ownership. The dynamics of the work environment are not viewed as a whole so that the employees are not viewed as owning anything worth protecting if it acts to the detriment of the employer. Bercusson argues that restrictions on picketing limit the ability of the employees to protect their interest which are no less worthy than those of the employer.

It is suggested that the alternative "marxist" perspective suggested by Bercusson is worthy of consideration by law makers in Britain and

Alberta, given their endorsement at the international and national levels of freedom of expression and freedom of assembly.

Freedoms cannot be practiced without restriction in an ordered society. Some limitations are justified. For example the laws of defamation protect against untrue expressions and the offences of riot and unlawful assembly can be used to control large groups. However, in continually viewing picketing during a trade dispute from the same legal perspective limitations have been imposed which all but destroy the exercise of civil liberties in this area. The proposals for new legislation in Britain and Alberta do not indicate that this trend will be reversed. It is suggested that it is now time to reassess the impact of common law and statute law on the practice of picketing during a trade dispute. Such a reassessment has been undertaken in Canada in the light of the Charter. The results have been disappointing for trade unionists. The Supreme Court of Canada has endorsed the same legal perspective and ruled that the test of whether picketing activity is justified is to be measured by the yardstick of the relevant provincial labour relations statute.[44] It seems that freedom of expression and freedom of assembly are ideals to which mere lip service is paid.[45] In practice, in the area of trade disputes the freedoms barely exist.

FOOTNOTES - CHAPTER 6

1. S.C. 1970, c.C-34.

2. 38 and 39 Vict. c.86 (U.K.)

3. 1974 (U.K.) c.52.

4. See Lewis Labour Law in Britain (1986) at 213.

5. See Public Order Act 1986 (U.K.) c.64, sched. 2 where section 7 is made an arrestable offence.

6. Lyons v. Wilkins [1899] 1 Ch. 255.

7. (1906) 22 T.L.R. 327.

8. [1975] All E.R. 1.

9. [1951] 3 D.L.R. 769.

10. [1985] I.R.L.R. 136.

11. See Appendix 1.

12. R.S.A. 1980, c.L-1.1.

13. Code of Practice on Picketing 1980 s.1 No. 1757.

14. Ellis Don Management Services Ltd. v. Sheet Metal Workers International Union [1987] Alta L.R.B.R. 307.

15. E.g. Edinburgh Developers Ltd. v. Vanderlaan [1974] 3 W.W.R. 481.

16. Supra n. 8.

17. 1974 (U.K.) c.52, s.17.

18. American Cynamid v. Ethicon [1975] A.C. 396.

19. Beaverbrook Newspapers v. Keys [1978] I.C.R. 582.

20. Pacific Western Airlines Ltd. v. International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (1986) 43 A.L.R. (2d) 289.

21. 1986 (U.K.) c.64.

22. 'Trade Unions and their Members' Cm. 95, Feb. 1987.

23. Ibid. para. 1.6.

24. 1984 (U.K.) c.49.

25. TUC Response, para. 13.

26. Ibid. Appendix, para. 7.

27. Bill 17, clause 5.

28. 1988, Bill 22, 3rd Session, 21st Legislature, 37 Elizabeth II.

29. S.A. 1980, c.C-22.3.

30. Ibid. s.8.

31. Supra n. 29, s.7.

32. Supra n. 28.

33. Supra n. 28, s.1(k) and s.4.

34. Supra n. 28, s.93.

35. Supra n. 28, s.70.

36. Ibid.

37. Government Amendment: June 20 1988.

38. Supra n. 15.

39. Supra n. 14.

40. [1975] All E.R. 1 at 17.

41. 1986 (U.K.) c.64.

42. See The Observer 1/5/88 in relation to the strike by the National Union of Seamen.

43. Bercusson "One Hundred Years of Conspiracy and Protection of Property: Time For a Change" (1977) 40 M.L.Rev. 268.

44. R.W.D.S.U. v. Dolphin Delivery Ltd. (1986) S.C.R. 573.

45. See s. 81(2)(d) of the proposed labour code in Alberta.

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APPENDIX I

British Statutes

Conspiracy and Protection of Property Act 1875 (38 and 39 Vict. c.86)

Section 3. An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable under the statute making the offence punishable to be imprisoned either absolutely or at the discretion of the court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

Section 7. Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,-

1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or,
2. Persistently follows such other person about from place to place; or,
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,
4. Watches or besets the house or other place where such other person resides, or works, or carries on business or happens to be, or the approach to such house or place; or
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction, or on indictment as herein-after mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Attending at or near the house or place where a person reside, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

Trade Dispute Act 1906 (6 Edw. VII, c.47)

Section 1. The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875:-

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

Section 2.-(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

(2) Section seven of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from "attending at or near" to the end of the section.

Section 3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that in induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.

Section 4.-(1) An action against a trade union, whether or workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

Section 5.-(1) This Act may be cited as the Trade disputes Act, 1906, and the Trade Union Acts, 1871 and 1876, and this Act may be cited together as the Trade Union Acts, 1871 to 1906.

(2) In this Act the expression "trade union" has the same meaning as in the Trade Union Acts, 1871 and 1876, and shall include any combination as therein defined, notwithstanding that such combination may be the branch of a trade union.

(3) In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises; and, in section three of the last-mentioned Act, the words "between employers and workmen" shall be repealed.

Trade Disputes and Trade Unions Act 1927 (17 and 18 Geo. 5)

Section 3.-(1) It is hereby declared that it is unlawful for one or more person (whether acting on their own behalf or on behalf of a trade union or of an individual employer or firm, and notwithstanding that they may be acting in contemplation or furtherance of a trade dispute) to attend at or near a house or place where a person resides or works or carries on business or happens to be, for the purpose of obtaining or communicating information or of persuading or inducing any person to work or to abstain from working, if they so attend in such numbers or otherwise in such manner as to be calculated to intimidate any person in that house or place, or to obstruct the approach thereto or egress therefrom or to lead a breach of the peace; and attending at or near any house or place in such numbers or in such manner as is by this subsection declared to be unlawful shall be deemed to be a watching or besetting of that house or place within the meaning of section seven of the Conspiracy, and Protection of Property Act, 1875.

(2) In this section the expression "to intimidate" means to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependants or of violence or damage to any person or property, and the expression "injury" includes injury to a person in respect of his business, occupation, employment or other source of income, and includes any actionable wrong.

(3) In section seven of the Conspiracy, and Protection of Property Act, 1875, the expression "intimidate" shall be construed as having the same meaning as in this section.

(4) Notwithstanding anything in this Act, it shall not be lawful for one or more persons, for the purpose of inducing any person to work or to abstain from working, to watch or beset a house or place where a person resides or the approach to such a house or

place, and any person who acts in contravention of this subsection shall be liable on summary conviction to a fine not exceeding twenty pounds or to imprisonment for a term not exceeding three months.

Public Order Act 1936

Section 5. Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.

Police Act 1964 (c.48)

Section 51 Assaults on constables

(1) Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable [on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding [level 5 on the standard scale] or to both].

(2) Subsection (2) of section 23 of the Firearms Act 1937 (additional penalty for possession of forearms when committing certain offences) shall apply to offences under subsection (1) of this section.

(3) Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding [level 3 on the standard scale], or to both.

Trade Dispute Act 1965 (c.48)

Section 1.-(1) An act done after the passing of this Act by a person in contemplation or furtherance of a trade dispute (within the meaning of the Trade Disputes Act 1906) shall not be actionable in tort on the ground only that it consists in his threatening-

(a) that a contract of employment (whether one to which he is a party or not will be broken, or

(b) that he will induce another to break a contract of employment to which that other is a party;

or be capable of giving rise to an action of reparation on the ground only that it so consists.

(2) An act done as aforesaid by a person before the passing of this Act shall not be actionable in tort as mentioned in the foregoing subsection unless proceedings in respect thereof have been instituted either before or within the period of six months beginning with the date of the passing of this Act or be capable of giving rise to an action of reparation as so mentioned unless proceedings in respect thereof have been so instituted.

Industrial Relations Act 1971 (c.72)

Section 96.-(1) It shall be an unfair industrial practice for any person, in contemplation or furtherance of an industrial dispute, knowingly to induce or threaten to induce another person to break a contract to which that other person is a party, unless the person so inducing or threatening to induce the breach of contract-

(a) is a trade union or an employers' association, or
(b) does so within the scope of his authority on behalf of a trade union or an employers' association.

(2) In this Part of this Act any reference to a trade union or an employers' association shall be construed as including a reference to an organisation which is for the time being entered in the provisional register.

(3) In this section "contract"-

(a) does not include a collective agreement or any part of a collective agreement, but
(b) notwithstanding anything in the preceding paragraph, includes so much of any contract of employment as is implied or incorporated in that contract by reference to a collective agreement.

Section 134.-(1) The provisions of this section shall have the effect where one or more persons (in this section referred to as "pickets"), in contemplation or furtherance of an industrial dispute, attend at or near-

(a) a place where a person works or carries on business, or
(b) any other place where a person happens to be, not being a place where he resides,

and do so only for the purpose of peacefully obtaining information from him or peacefully communicating information to him or peacefully persuading him to work or not to work.

(2) In the circumstances specified in the preceding subsection, the attendance of the pickets at that place for that purpose-

(a) shall not of itself constitute an offence under section 7 of the Conspiracy, and Protection of Property Act 1875 (penalty for intimidation or annoyance by violence or otherwise) or under any other enactment or rule of law, and
(b) shall not of itself constitute a tort.

Trade Union and Labour Relations Act 1974 c.52 - as amended by the Trade Union and Labour Relations (Amendment) Act 1976 (U.K.) c.7 and the Employment Protection Act 1975 (U.K.) c.71.

Acts in contemplation or furtherance of trade disputes

Section 13.-(1) An Act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only-

(a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance; or
(b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or to interfere with its performance.

(2) For the avoidance of doubt it is hereby declared that an act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only that it is an interference with the trade, business or employment of another person, or with the right of another person to dispose of his capital or his labour as he wills.

(3) For the avoidance of doubt it is hereby declared that-

(a) an act which by reason of subsection (1) or (2) above is itself not actionable;
(b) a breach of contract in contemplation or furtherance of a trade dispute;

shall not be regarded as doing of an unlawful act or as the use of unlawful means for the purpose of establishing liability in tort.

(4) An agreement or combination by two or more persons to do or procure the doing of any act in contemplation or furtherance of a trade dispute shall not be actionable in tort if the act is one which, if done without any such agreement or combination, would not be actionable in tort.

Section 14.-(1) Subject to subsection (2) below, no action in tort shall lie in respect of any act-

(a) alleged to have been done by or on behalf of a trade union which is not a special register body or by or on behalf of an unincorporated employers' association; or
(b) alleged to have been, done, in connection with the regulation of relations between employers or employers' associations and workers or trade unions, by or on behalf of a trade union which is a special register body or on behalf of an employers' association which is a body corporate; or
(c) alleged to be threatened or to be intended to be done as mentioned in paragraph (a) or (b) above;

against the union or association in its own name, or against the trustees of the union or association, or against any members or officials of the union or association on behalf of themselves and all other members of the union or association.

(2) Subsection (1) above shall not affect the liability of a trade union or employers' association to be sued in respect of the following, if not arising from an act done in contemplation or furtherance of a trade dispute, that is to say-

(a) any negligence, nuisance or breach of duty (whether imposed on them by any rule of law or by or under any enactment resulting in personal injury to any person; or
(b) without prejudice to paragraph (a) above, breach of any duty so imposed in connection with the ownership, occupation, possession, control or use of property (whether real or personal or, in Scotland, heritable or moveable).

(3) In this section "personal injury" includes any disease and any impairment of a person's physical or mental condition.

Section 15. It shall be lawful for one or more persons in contemplation or furtherance of a trade dispute to attend at or near-

(a) a place where another person works or carries on business; or
(b) any other place where another person happens to be, not being a place where he resides,

for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

Section 16. No court shall, whether by way of-

(a) an order for specific performance or specific implement of a contract of employment, or
(b) an injunction or interdict restraining a breach or threatened breach of such a contract,

compel an employee to do any work or attend at any place for the doing of any work.

Section 17.-[1] Where an application for an injunction or interdict is made to a court in the absence of the party against whom the injunction or interdict is sought or any representative of his and that party claims, or in the opinion of the court would be likely to claim, that he acted in contemplation or furtherance of a trade dispute, the court shall not grant the injunction or interdict unless satisfied that all steps which in the circumstances were reasonable have been taken with a view to securing that notice of the application and an opportunity of being heard with respect to the application have been given to the party.

(2) It is hereby declared for the avoidance of doubt that where an application is made to a court, pending the trial of an action, for an interlocutory injunction and the party against whom the injunction is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing the matter or matters which would, under any provision of section 13, 14(2) or 15 above, afford a defence to the action.

(3) Subsection (2) above shall not extend to Scotland.

Section 29.-(1) In this Act "trade dispute" means a dispute between employers and workers, or between workers and workers, which is connected with one or more of the following, that is to say-

(a) terms and conditions of employment, or the physical conditions in which any workers ar required to work;
(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
(c) allocation of work or the duties of employment as between workers or groups of workers;
(d) matters of discipline;

(e) the membership or non-membership of a trade union on the part of a worker;
(f) facilities for officials of trade unions; and
(g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures.

(2) A dispute between a Minister of the Crown and any workers shall, notwithstanding that he is not the employer of those workers, be treated for the purposes of this Act as a dispute between an employer and those workers if the dispute relates-

(a) to matters which have been referred for consideration by a joint body on which, by virtue of any provision made by or under any enactment, that Minister is represented; or
(b) to matters which cannot be settled without that Minister exercising a power conferred on him by or under an enactment.

(3) There is a trade dispute for the purposes of this Act even though it relates to matters occurring outside Great Britain [...].

(4) A dispute to which a trade union or employers' association is a party shall be treated for the purposes of this Act as a dispute to which workers or, as the case may be, employers are parties.

(5) An act, threat or demand done or made by one person or organisation against another which, if resisted, would have led to a trade dispute with that other, shall notwithstanding that because that other submits to the act or threat or accedes to the demand no dispute arises, be treated for the purposes of this Act as being done or made in contemplation of a trade dispute with that other.

(6) In this section-
"employment" includes any relationship whereby one person personally does work or performs services for another;
"worker", in relation to a dispute to which an employer is a party, includes any worker even if not employed by that employer.

(7) [Repealed by the Criminal Law Act 1977 (c.45), s.65 and Sched. 13.]

Criminal Law Act 1977 c.45

Section 1. (1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.

(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary of the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

(3) Where in pursuance of any agreement the acts in question in relation to any offence are to be done in contemplation or furtherance of a trade dispute (within the meaning of the Trade Union and Labour Relations Act 1974) that offence shall be disregarded for the purposes of subsection (1) above provided that it is a summary offence which is not punishable with imprisonment.

(4) In this Part of this Act "offence" means an offence triable in England and Wales, except that it includes murder notwithstanding that the murder in question would not be so triable if committed in accordance with the intentions of the parties to the agreement.

Employment Act 1980 (c.42)

Section 16.-(1) For section 15 of the 1974 Act there shall be substituted- "**Peaceful picketing**

Section 15.-(1) It shall be lawful for a person in contemplation or furtherance of a trade dispute to attend-

(a) at or near his own place of work, or

(b) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying and whom he represents,

for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

(2) If a person works or normally works-

(a) otherwise than at any one place, or

(b) at a place the location of which is such that attendance there for a purpose mentioned in subsection (1) above is impracticable,

his place of work for the purposes of that subsection shall be any premises of his employer from which he works or from which his work is administered.

(3) In the case of a worker who is not in employment and whose last employment was terminated in connection with a trade dispute, subsection (1) above shall in relation to that dispute have effect as if any reference to his place of work were a reference to his former place of work.

(4) A person who is an official of a trade union by virtue only of having been elected or appointed to be a representative of some of the members of the union shall be regarded for the purposes of subsection (1) above as representing only those members; but otherwise an official of a trade union shall be regarded for those purposes as representing all of its members."

(2) Nothing in section 13 of the 1974 Act shall prevent an act done in the course of picketing from being actionable in tort unless it is done in the course of attendance declared lawful by section 15 of that Act.

(3) In subsection (2) above "tort" has as respects Scotland the same meaning as in the 1974 Act.

17.-(1) Nothing in section 13 of the 1974 Act shall prevent an act from being actionable in tort on a ground specified in subsection (1)(a) or (b) of that section in any case where-

(a) the contract concerned is not a contract of employment, and
(b) one of the facts relied upon for the purpose of establishing liability is that there has been secondary action which is not action satisfying the requirement of subsection (3), (4) or (5) below.

(2) For the purposes of this section there is secondary action in relation to a trade dispute when, and only when, a person-

(a) induces another to break a contract of employment or interferes or induces another to interfere with its performance, or
(b) threatens that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance,

if the employer under the contract of employment is not a party to the trade dispute.

(3) Secondary action satisfies the requirements of this subsection if-

(a) the purpose or principal purpose of the secondary action was directly to prevent or disrupt the supply during the dispute of goods or services between an employer who is a party to the dispute and the employer under the contract of employment to which the secondary action relates; and

(b) the secondary action (together with any corresponding action relating to other contracts of employment with the same employer) was likely to achieve that purpose.

(4) Secondary action satisfies the requirements of this subsection if-

(a) the purpose or principal purpose of the secondary action was directly to prevent or disrupt the supply during the dispute of goods or services between any person and an associated employer of an employer who is a party to the dispute; and

(b) the goods or services are in substitution for goods or services which but for the dispute would have fallen to be supplied to or by the employer who is a party to the dispute; and

(c) the employer under the contract of employment to which the secondary action relates is either the said associated employer or the other party to the supply referred to in paragraph (a) above; and

(d) the secondary action (together with any corresponding action relating to other contracts of employment with the same employer) was likely to achieve the purpose referred to in paragraph (a) above.

(5) Secondary acton satisfies the requirements of this subsection if it is done in the course of attendance declared lawful by section 15 of the 1974 Act-

(a) by a worker employed (or, in the case of a worker not in employment, last employed) by a party to the dispute or

(b) by a trade union official whose attendance is lawful by virtue of subsection (1)(b) of that section.

(6) In subsections (3)(a) and (4)(a) above-

(a) references to the supply of goods or services between two persons are references to the supply of goods or services by one to the other in pursuance of a contract between them subsisting at the time of the secondary action, and

(b) references to directly preventing or disrupting the supply are references to preventing or disrupting it otherwise than by means of preventing or disrupting the supply of goods or services by or to any other person.

(7) Expressions used in this section and in the 1974 Act have the same meanings in this section as in that Act; and for the purposes of this section an employer who is a member of an employers' association which is a party to a trade dispute shall by virtue of his membership be regarded as a party to the dispute if he is represented in the dispute by the association, but not otherwise.

(8) Subsection (3) of section 13 of the 1974 Act shall cease to have effect.

Section 18.-(1) Nothing in section 13 of the 1974 Act shall prevent an act to which this section applies from being actionable in tort on a ground specified in subsection (1)(a) or (b) of section 13 in any case where-

(a) the contract concerned is a contract of employment, or

(b) the contract concerned is not a contract of employment but one of the facts relied upon for the purpose of establishing liability is that any person has-

(i) induced another to break a contract of employment or interfered or induced another to interfere with its performance, or

(ii) threatened that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance.

(2) This section applies to an act done for the purpose of compelling workers to become members of a particular trade union or of one of two or more particular trade unions, if none of those workers works for the same employer or at the same place as the employee working under the contract of employment referred to in subsection (1) above.

(3) Expressions used in this section and in the 1974 Act have the same meanings in this section as in that Act.

Code of Practice on Picketing (S.I. No. 1757)

Section A

INTRODUCTION

1. The Code is intended to provide practical guidance on picketing in trade disputes for those who may be contemplating, organising or taking part in a picket and for those who as employers or workers or members of the general public may be affected by it.

2. There is no legal "right to picket" as such but peaceful picketing has long been recognised as being lawful. However, the law

imposes certain limits on how and where lawful picketing can be undertaken so as to ensure that there is proper protection for those who may be affected by picketing, including those who want to go to work normally.

3. It is a civil wrong, actionable in the civil courts, to persuade someone to break his contract of employment or to secure the breaking of a commercial contract. But the law exempts from this liability those acting in contemplation or furtherance of a trade dispute, including pickets, provided that they are picketing only at their own place of work. The criminal law, however, applies to pickets just as it applies to every one else: they have no exemption from the provisions of the criminal law (e.g. as to obstruction and public order).

4. The Code outlines the law on picketing (although it is of course for the courts and industrial tribunals to interpret and apply the law in particular cases). Sections B and C outlihe the provisions of the civil and criminal law respectively and Section D describes the role of the police in enforcing the law. The Code-in Sections E, F and G-also gives guidance on good practice in the conduct of picketing.

5. The Code itself imposes no legal obligations and failure to observe it does not by itself render anyone liable to proceedings. But section 3(8) of the Employment Act 1980 provides that any provisions of the Code are to be admissible in evidence and taken into account in proceedings before any court or industrial tribunal or the Central Arbitration Committee where they consider them relevant.

Section B

PICKETING AND THE CIVIL LAW

6. Section 15 of the Trade Union and Labour Relations Act 1974 (as amended by the Employment Act 1980) provides the basic rules for lawful industrial picketing:

(i) it may only be undertaken in contemplation or furtherance of a trade dispute;

(ii) it may only be carried out by a person attending at or near his own place or work; a trade union official in addition to attending at or near his own place of work may also attend at or near the place of work of a member of his trade union whom he is accompanying on the picket line and whom he represents;

(iii) its only purpose must be peacefully obtaining or communicating information or peacefully persuading a person to work or not to work.

7. Picketing commonly involves persuading employees to break their contracts of employment by not going into work and, by disrupting the business of the employer who is being picketed, interfering with his commercial contracts with other employers. If pickets follow the rules outlined in paragraph 6 they are protected by section 13 of the Trade Union and Labour Relations Act 1974 (as

amended) from being sued in the civil courts for these civil wrongs. These rules are explained more fully in paragraphs 10 to 19 below.

8. These rules apply in the normal cases where employees picket at their own place of work in support of a dispute with their own employer. Cases may arise, however, where employees picket at their own place of work in support of a dispute between another employer and his employees, for example, where employees at one place are involved in a strike in support of a dispute elsewhere and have mounted a picket line at their own place of work in the course of that strike.

9. In such cases the picketing, in order to be protected, must further satisfy the requirements of lawful secondary action contained in section 17 of the Employment Act 1980. (These are described in detail in the Annex). In practice this means that these pickets will have to target their picketing precisely on the supply of goods or services between their employer and the employer in dispute. If they impose or threaten an indiscriminate blockade on their employer's premises, they will be liable to be sued in the civil courts.

In contemplation or furtherance of a trade dispute

10. Picketing is lawful only if it is carried out in contemplation or furtherance of a trade dispute. A trade dispute is defined in section 29 of the Trade Union and Labour Relations Act 1974 (as amended). It covers all the matters which normally occasion disputes between employers and workers such as terms and conditions of employment, the allocation of work, matters of discipline, trade union recognition and membership or non-membership of a trade union.

Attendance at or near his own place of work

11. It is lawful for a person to induce a breach of contract in the course of picketing only if he pickets at or near his own place of work.

12. "At or near his own place of work" is not defined in statute. In general, however, except for those covered by paragraphs 13 and 14 below, lawful picketing normally involves attendance at an entrance to or exit from the factory, site or office at which the picket works. It does not enable a picket to attend lawfully at an entrance to or exit from any place of work which is not his own, even if those who work there are employed by the same employer or covered by the same collective bargaining arrangements. The law does not protect anyone who pickets without permission on or inside any part of premises which are private property. Pickets who trespass may be sued in the civil courts.

13. Section 15 of the 1974 Act (as amended by the Employment Act 1980) distinguishes two specific group of employees:

those (e.g. mobile workers) who work at more than one place; and
those for whom it is impracticable to picket at their own place or work because of its location.

It declares that it is lawful for such workers to picket those premises of their employer from which they work or from which their work is administered. In the case of lorry drivers, for example, this will usually mean in practice those premises of their employer from which their vehicles operate.

14. Special provisions also govern people who are not in employment and who have lost their jobs for reasons connected with the dispute which has occasioned the picketing. This might arise, for example, where the dismissal of a group of employees has led directly to a strike, or where in the course of a dispute an employer has terminated his employees' contracts of employment because those employees refuse to work normally. In such cases section 15 declares that it is lawful for a worker to picket at his former place of work. This does not apply, however, to any workers who have subsequently found a job at another place of work. Such workers may only picket lawfully at their new place of work in the course of a dispute with their new employer or in the course of lawful secondary action.

Trade union officials

15. For the reasons described in Section F it is often helpful to the orderly organisation and conduct of picketing for a trade union official to be present on a picket line where his members are picketing. Section 15 of the 1974 Act (as amended by the Employment Act 1980) therefore makes it lawful for a trade union official to picket at any place of work provided that:

(i) he is accompanying members of his trade union who are picketing lawfully at or near their own place of work; and

(ii) he personally represents those members within their trade union.

If these conditions are satisfied then a trade union official has the same legal protection as other pickets who picket lawfully at or near their own place of work.

16. Under section 15 of the 1974 Act (as amended by the Employment Act 1980) an official-whether a lay official or an employee of the union-is regarded for this purpose as representing only those members of his union whom he has been specifically appointed or elected to represent. An official cannot, therefore, claim that he represents a group of members simply because they belong to his trade union. He must represent and be responsible for them in the normal course of his trade union duties. For example, it is lawful for an official (such as a shop steward) who represents members at a particular place of work to be present on a picket line where those members are picketing lawfully; for a branch official to be present only where members of his branch are lawfully picketing; for a regional official to be present only where members of his region are lawfully picketing; for a national official who represents a particular trade group or section within the union, to be present wherever members of that trade group or section are lawfully picketing; and for a national official such as a General Secretary or president who represents the whole union to be present wherever any members of his union are picketing lawfully.

17. Trade union officials may, of course, picket lawfully at their own place of work, whether or not their members are also picketing. However, to be entitled to picket at a place of work other than their own, they must satisfy the conditions laid down in

section 15 of the Trade Union and Labour Relations Act 1974 (as amended by the Employment Act 1980) and described in paragraphs 15 and 16 above.

Lawful purposes of picketing

18. the only purposes of picketing declared lawful by section 15 are:

peacefully obtaining and communicating information; and
peacefully persuading a person to work or not to work.

Pickets may, therefore, seek to explain their case to those entering or leaving the picketed premises and to ask them not to enter or leave the premises where the dispute is taking place. This may be done verbally or it may involve the distribution of leaflets or the carrying of banners or placards putting the pickets' case. Pickets have, however, no powers to require other people to stop or to compel them to listen or to do what they have asked them to do. A person who decides to cross a picket line must be allowed to do so.

19. Picketing which is accompanied by, for example, violent, threatening or obstructive behaviour goes beyond peaceful persuasion and is therefore unlawful. As explained in Section C, a picket who threatens or intimidates someone, or obstructs an entrance to a workplace, or causes a breach of the peace commits a criminal offence. But in addition pickets who commit such criminal offences, may forfeit their immunity under the civil law and may be liable to be sued for inducing or threatening to induce a breach of contract.

Seeking redress

20. An employer or an employee whose contracts are interfered with by picketing which does not comply with the rules described in paragraphs 10-19 above has a civil law remedy. He may start an action for damages against those responsible and also ask the court to make an order stopping the unlawful picketing.

21. An order will normally be sought against the person on whose instructions or advice the picketing is taking place, but it will usually apply not only to him but to any others acting on his behalf or on his instructions. Thus an organiser of picketing cannot avoid liability by, for example, changing the members of the picket line each day. Moreover, if a person knows that such an order has been made against some one and yet aids and abets him in breaking it, he may be in contempt of court himself and liable to be punished by the court.

Section C

PICKETING AND THE CRIMINAL LAW

22. If a picket commits a criminal offence he is just as liable to be prosecuted as any other member of the public who breaks the law. The immunity provided under the civil law does not protect him in any way.

23. The criminal law protects the right of every person to go about his lawful daily business free from interference by others. No

one is under any obligation to stop when a picket asks him to do so or, if he does stop, to comply with the picket's request, for example, not to go into work. Everyone has the right, if he wishes to do so, to cross a picket line in order to go into his place of work or to deliver or collect goods. A picket may exercise peaceful persuasion but if he goes beyond that and tries by means other than peaceful persuasion to deter another person from exercising those rights he may commit a criminal offence.

24. Among other matters it is a criminal offence for pickets (as for others)

to use threatening or abusive language or behaviour directed against any person, whether a worker seeking to cross a picket line, an employer, an ordinary member of the public or the police;

to use or threaten violence to a person or his family;

to intimidate a person by threatening words or behaviour which cause him to fear harm or damage if he fails to comply with the picket's demands;

to obstruct the highway or the entrance to premises or to seek physically to bar the passage of vehicles or persons by laying down in the road, linking arms across or circling in the road, or jostling or physically restraining those entering or leaving the premises;

to be in possession of an offensive weapon;

intentionally or recklessly to damage property;

to engage in violent, disorderly or unruly behaviour to take any action which is likely to lead to a breach of the peace;

to obstruct a police officer in the execution of his duty.

25. A picket has no right under the law to require a vehicle to stop or to be stopped. The law allows him only to ask a driver to stop by words or signals. A picket may not physically obstruct a vehicle if the driver decides to drive on or, indeed, in any other circumstances. A driver must-as on all other occasions-exercise due care and attention when approaching or driving past a picket line, and may not drive in such a manner as to give rise to a reasonably foreseeable risk of injury.

Section D

ROLE OF THE POLICE

26. It is not the function of the police to take a view of the merits of a particular trade dispute. They have a general duty to uphold the law and keep the peace, whether on the picket line or elsewhere. The law gives the police discretion to take whatever measures may reasonably be considered necessary to ensure that picketing remains peaceful and orderly.

27. The police have no responsibility for enforcing the civil law. An employer cannot require the police to help in identifying the pickets against whom he wishes to seek an order from the civil court. Nor is it the job of the police to enforce the terms of an

order. Enforcement of an order on the application of a plaintiff is a matter for the court and its officers. The police may, however, decide to assist the officers of the court if they think there may be a breach of the pace.

28. As regards the criminal law the police have considerable discretionary powers to limit the number of pickets at any one place where they have reasonable cause to fear disorder. The law does not impose a specific limit on the number of people who may picket at any one place; nor does this Code affect in any way the discretion of the police to limit the number of people on a particular picket line. It is for the police to decide, taking into account all the circumstances, whether the number of pickets at any particular place is likely to lead to a breach of the peace. If a picket does not leave the picket line when asked to do so by the police, he is liable to be arrested for obstruction either of the highway or of a police officer in the execution of his duty if the obstruction is such as to cause, or be likely to cause, a breach of the peace.

Section E

LIMITING NUMBERS OF PICKETS

29. The main cause of violence and disorder on the picket line is excessive numbers. Wherever large numbers of people with strong feelings are involved there is a danger that the situation will get out of control and that those concerned will run the risk of arrest and prosecution.

30. This is particularly so whenever people seek by sheer weight of numbers to stop others going into work or delivering or collecting goods. In such cases, what is intended is not peaceful persuasion, but obstruction if not intimidation. Such a situation is often described as "mass picketing". In fact, it is not picketing in its lawful sense of an attempt at peaceful persuasion and may well result in a breach of the peace or other criminal offences. Moreoever, anyone seeking to demonstrate support for those in dispute should keep well away from any picket line so as not to create the risk of a breach of the peace or other criminal offence being committed on that picket line.

31. Large numbers on a picket line are also likely to give rise to fear and resentment amongst those seeking to cross that picket line even where no criminal offence is committed. They exacerbate disputes and sour relations not only between management and employees but between the pickets and their fellow employees. Accordingly pickets and their organisers should ensure that in general the number of pickets does not exceed six at any entrance to a workplace; frequently a smaller number will be appropriate.

Section F

ORGANISATION OF PICKETING

Functions of the picket organiser

32. An experienced person, preferably a trade union official who represents those picketing, should always be in charge of the picket line. He should have a letter of authority from his union which he can show to police officers or to people who want to cross the picket line. Even when he is not on the picket line himself he should be available to give the pickets advice if a problem arises.

33. An organiser of pickets should maintain close contact with the police. Advance consultation with the police is always in the best interests of all concerned. In particular the organiser and the pickets should seek directions from the police on the number of people who should be present on the picket line at any one time and on where they should stand in order to avid obstructing the highway.

34. The other main functions of the picket organiser should be:

to ensure that pickets understand the law and the provisions of this Code and that the picketing is conducted peacefully and lawfully;

to be responsible for distributing badges or armbands, which authorised pickets should wear so that they are clearly identified;

to ensure that employees from other places of work do not join the picket line and that any offers of support on the picket line from outsiders are refused;

to remain in close contact with his own union office, and with the offices of other unions if they are involved in the picketing;

to ensure that such special arrangements as may be necessary for essential supplies or maintenance (see paragraph 38) are understood and observed by the pickets.

Consultation with other trade unions

35. Where several unions are involved in a dispute, they should consult each other about the organisation of any picketing. It is important that they should agree how the picketing is to be carried out, how may pickets there should be from each union and who should have overall responsibility for organising them.

Right to cross picket lines

36. Everyone has the right to decide for himself whether he will cross a picket line. Disciplinary action should not be taken or threatened by a union against a member on the ground that he has crossed a picket line which is not authorised or which was not at the member's place of work. Under section 4 of the Employment Act 1980 exclusion or expulsion from a union in a closed shop on such grounds may be held to be unreasonable.

Section G

ESSENTIAL SUPPLIES AND SERVICES

37. Pickets should take very great care to ensure that their activities do not cause distress, hardship or inconvenience to members of the public who are not involved in the dispute. Pickets should take particular care to ensure that the movement of essential goods and supplies, the carrying out of essential maintenance of plant and equipment and the provision of services essential to the life of the community are not impeded, still less prevented. Arrangements to ensure this should be agreed in advance between the unions and employers concerned.

38. The following list of essential supplies and services is provided as an illustration but it is not intended to be comprehensive:

supplies for the production, packaging, marketing, and/or distribution of medical and pharmaceutical products;

supplies essential to health and welfare institutions, e.g. hospitals, old people's homes;

heating fuel for schools, residential institutions and private residential accommodation;

other supplies for which there is a crucial need during a crisis in the interests of public health and safety (e.g. chlorine, lime and other agents for water purification; industrial and medical gases; sand and salt for road gritting purposes);

supplies of goods and services necessary to the maintenance of plant and machinery;

supplies for the production, packaging, marketing and/or distribution of food and animal feeding stuffs;

the operation of essential services, such as police, fire, ambulance, medical and nursing services, air safety, coastguard and air sea rescue services and services provided by voluntary bodies (e.g. Red Cross and St. John's ambulances, meals on wheels, hospital car service) and mortuaries, burial and cremation services.

Annex

SECONDARY ACTION AND PICKETING

1. This Annex amplifies the description of lawful secondary action in paragraph 9 of Section B (Picketing and the Civil Law).

2. It is lawful for employees who are in dispute with their own employer to picket peacefully at their own place of work. As the Code explains such pickets have immunity from civil actions if in the course of picketing they interfere with contracts.

3. Anyone who contemplates picketing at his own place of work in furtherance of a dispute between another employer and his workers is subject to separate and more restrictive provisions. In such

cases picketing must satisfy the requirement of section 17 of the Employment Act 1980 (as set out in paragraphs 4 and 5 below).

4. If such pickets interfere only with contracts of employment then they are protected by the statutory immunity. If, however they also interfere with commercial contracts (by means, for example, of inducing breaches of contracts of employment), their activities will be immune from civil proceedings only if:

(a) their employer is a supplier to, or customer of, the employer in dispute under a contract to provide goods or services; and

(b) the principal purpose of the picketing is directly to prevent or disrupt the supply of goods or services during the dispute between their employer and the employer in dispute; and

(c) the picketing is likely to achieve that purpose.

5. Employees of an associated employer of the employer in dispute and of suppliers and customers of that associated employer may also picket lawfully at their own place of work if:

(a) their principal purpose is to disrupt the supply of goods and services between the associated employer and his supplier or customer; and

(b) those goods or services are in substitution for goods or services which but for the dispute would have been supplied to or by the employer in dispute; and

(c) the secondary action is likely to achieve the purpose in (a) above.

6. In practice this means that any picketing by employees who are not in dispute with their own employer must be very specifically targeted

in the case of customers and suppliers of the employer in dispute, on the business being carried out during the dispute between the customer or supplier and the employer in dispute; or

in the case of the associated employer, on work which has been transferred from the employer in dispute because of the dispute.

There is no immunity for interfering with commercial contracts by indiscriminate picketing at customers and suppliers or at associated employers of the employer in dispute.

Highways Act 1980 (c.66)

Section 137 Penalty for wilful obstruction

(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale].

Employment Act 1982 (c.46)

Actions in tort against trade unions and employers' associations

Section 15.-(1) Section 14 of the 1974 Act (immunity for trade unions and employers' associations from certain actions in tort) shall cease to have effect.

(2) Where proceedings in tort are brought against a trade union-

(a) on a ground specified in paragraph (a) or (b) of section 13(1) of the 1974 Act; or

(b in respect of an agreement or combination by two or more persons to do or to procure the doing of an act which, if it were done without any such agreement or combination, would be actionable in tort on such a ground;

then, for the purpose of determining in those proceedings whether the union is liable in respect of the act in question, that act shall be taken to have been done by the union if, but only if, it was authorised or endorsed by a responsible person.

(3) For the purposes of this section, but subject to subsection (4) below, an act shall not be taken to have been authorised or endorsed by a responsible person unless it was authorised or, as the case may be, endorsed-

(a) by the principal executive committee;

(b) by any other person, who is empowered by the rules to authorise or, as the case may be, endorse acts of the kind in question;

(c) by the president or general secretary;

(d) by any other official who is an employed official;

(e) by any committee of the union to whom an employed official regularly reports.

(4) An act shall not be taken, by virtue of subsection (3)(d) or (e) above, to have been authorised or endorsed by a responsible person if-

(a) that person was, at the time in question, prevented by the rules from authorising or endorsing acts of the kind in question; or

(b) the act has been repudiated by the principal executive committee or by the president or general secretary.

(5) For the purposes of subsection (4)(b) above, an act shall not be treated as repudiated unless-

(a) it is repudiated as soon as is reasonably practicable after the purported authorisation or endorsement of the act has come to the knowledge of the principal executive committee or, as the case may be, of the president or general secretary; and

(b) the person who purported to authorise or endorse the act has been notified in writing and without delay that it has been repudiated.

(6) An act shall not be treated as repudiated, notwithstanding subsection (5) above, if at any time after the union concerned purported to repudiate it the principal executive committee or

president or general secretary has behaved in a manner which is inconsistent with the purported repudiation.

(7) In this section-

"general secretary" means the official of the union concerned who holds the office of general secretary or, where there is no such office, who holds the office which is equivalent, or the nearest equivalent, to that of general secretary;

"official" means an official of the union concerned; and "employed official" means, in relation to that union, an official who is employed by it;

"president" means the official of the union concerned who holds the office of president or, where there is no such office, who holds the office which is equivalent, or the nearest equivalent, to that of president;

"principal executive committee" means the principal committee of the union concerned exercising executive functions, by whatever name it is known;

"rules" means the written rules of the union and any other written provisions forming part of the contract between a member and the other members (or, in the case of a special register body, between a member and the body).

(8) Where, for the purpose of any proceedings, an act is by virtue of this section taken to have been done by a trade union nothing in this section shall affect the liability of any other person in those or any other proceedings in respect of that act.

Limit on damages awarded against trade unions in actions in tort

Section 16. (1) Subject to subsection (2) below, in any proceedings in tort brought against a trade union the amount which may be awarded against the union by way of damages in those proceedings shall not exceed the appropriate limit.

(2) Subsection (1) above does not apply to any proceedings-

(a) for any of the following resulting in personal injury to any person, that is to say negligence, nuisance or breach of duty; or

(b) without prejudice to paragraph (a) above, for breach of duty in connection with the ownership, occupation, possession, control or use of property (whether real or personal or, in Scotland, heritable or moveable).

(3) The appropriate limit is-

(a) £10,000, if the union has less than 5,000 members;

(b) £50,000, if it has 5,000 or more members but less than 25,000 members;

(c) £125,000, if it has 25,000 or more members but less than 100,000 members; and

(d) £250,000, it has 100,000 or more members.

(4) The Secretary of State may by order vary any of the sums for the time being specified in subsection (3) above.

(5) An order under subsection (4) above-

(a) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and

(b) may make such transitional provision as the Secretary of State considers appropriate.

(6) In this section-

"duty" means a duty imposed by any rule of law or by or under any enactment; and

"personal injury" includes any disease and any impairment of a person's physical or mental condition.

(7) For the purposes of this section, in any case where a trade union consists wholly or mainly or organisations or representatives of organisations, the members of such of those organisations as have their head or main office in Great Britain shall be treated as members of the union.

Recovery of sums awarded in proceedings involving trade unions and employers' associations

Section 17.-(1) Where in any proceedings an amount is awarded by way of damages, costs or expenses-

(a) against a trade union or employers' association;

(b) against trustees in whom property is vested in trust for a trade union or employers' association, in their capacity as such and otherwise than in respect of a breach of trust on their part; or

(c) against members or officials of a trade union or employers' association on behalf of themselves and all of the members of the union or association;

no part of that amount shall be recoverable by enforcement against any protected property.

(2) In this section "protected property" means any property-

(a) belonging to the trustees concerned otherwise than in their capacity as such;

(b) belonging to any member of the union or association concerned otherwise than jointly or in common with the other members;

(c) belonging to any official of the union or association concerned who is neither a member nor such a trustee;

(d) comprised in a political fund of the union concerned; or

(e) comprised in a provident benefits fund of the union concerned.

(3) In subsection (2) above-

"political fund" means a fund which is a political fund for the purposes of section 3 of the Trade Union Act 1913 and which is (and was at the time when the act in respect of which the proceedings are brought was done) subject to rules of the union which prevent property which is or has been comprised in the fund from being used for financing strikes or other industrial action;

"provident benefits" includes any payment, expressly authorised by the rules of the union, which is made to a member during sickness or incapacity for personal injury or while out of work, or to an aged member by way of superannuation, or to a member who has met with an accident or has lost his tools by fire or theft, and includes a payment in discharge or aid of funeral expenses on the death of a member or the wife of a member, or as provision for the children of a deceased member; and

"provident benefits fund" means a separate fund which is maintained in accordance with the rules of the union for the purpose only or providing provident benefits.

Meaning of "trade dispute"

Section 18.-(1) Section 29 of the 1974 Act (meaning of "trade dispute") shall be amended as follows.

(2) In the opening words of subsection (1) (which define a "trade dispute" by reference to the parties to the dispute and its connection with certain matters)-

(a) for "between employers and workers" there shall be substituted "between workers and their employer";

(b) the words ", or between workers and workers," shall be omitted;

(c) for "is connected with" there shall be substituted "relates wholly or mainly to".

(3) In subsection (2) (which extends the definition to certain disputes with a Minister of the Crown who does not employ the workers in question) for "employer and those workers" there shall be substituted "those workers and their employer".

(4) In subsection (3) (which extends the definition to disputes relating to matters occurring outside Great Britain) for "occurring outside Great Britain" there is substituted "occurring outside the United Kingdom, so long as the person or persons whose actions in the United Kingdom are said to be in contemplation or furtherance of a trade dispute relating to matters occurring outside the United Kingdom are likely to be affected in respect of one or more of the matters specified in subsection (1) of this section by the outcome of that dispute".

(5) Subsection (4) (which provides that a dispute with a trade union or employers' association is necessarily to be treated as a dispute to which workers or, as the case, may be, employers are a party) shall be omitted.

(6) In subsection (6) for the definition of "worker" there is substituted-

"worker", in relation to a dispute with an employer, means-

(a) a worker employed by that employer; or

(b) a person who has ceased to be employed by that employer where-

(i) his employment was terminated in connection with the dispute; or

(ii) the termination of his employment was one of the circumstances giving rise to the dispute".

(7) The amendments made by this section do not affect the question whether an act done by a person is done by him in contemplation or furtherance of a dispute, whether he is a party to the dispute or not.

Amendment of sections 13 and 30 of the 1974 Act

Section 19.-(1) In section 13 of the 1974 Act (acts in contemplation or furtherance of trade disputes) subsection (2) shall cease to have effect.

(2) In section 30 of the 1974 Act (interpretation), in the translation of "tort" as respects Scotland, for the words from "any" to "reparation" there shall be substituted the word "delict".

Police and Criminal Evidence Act 1984 (c.60)

Section 4 Road checks

(1) This section shall have effect in relation to the conduct of road checks by police officers for the purpose of ascertaining whether a vehicle is carrying-

- (a) a person who has committed an offence other than a road traffic offence or a vehicles excise offence;
- (b) a person who is witness to such an offence;
- (c) a person intending to commit such an offence; or
- (d) a person who is unlawfully at large.

(2) For the purposes of this section a road check consists of the exercise in a locality of the power conferred by section 159 of the Road Traffic Act 1972 in such a way as to stop during the period for which its exercise in that way in that locality continues all vehicles or vehicles selected by any criterion.

(3) Subject to subsection (5) below, there may only be such a road check if a police officer of the rank of superintendent or above authorises it in writing.

(4) An officer may only authorise a road check under subsection (3) above-

- (a) for the purpose specified in subsection (1)(a) above, if he has reasonable grounds-
  - (i) for believing that the offence is a serious arrestable offence; and
  - (ii) for suspecting that the person is, or is about to be, in the locality in which vehicles would be stopped if the road check were authorised;
- (b) for the purpose specified in subsection (1)(b) above, if he has reasonable grounds for believing that the offence is a serious arrestable offence;
- (c) for the purpose specified in subsection (1)(c) above, if he has reasonable grounds-
  - (i) for believing that the offence would be a serious arrestable offence; and
  - (ii) for suspecting that the person, is, or is about to be, in the locality in which vehicles would be stopped if the road check were authorised;
- (d) for the purposes specified in subsection (1)(d) above, if he has reasonable grounds for suspecting that the person is, or is about to be, in that locality.

(5) An officer below the rank of superintendent may authorise such a road check if it appears to him that it is required as a matter of urgency for one of the purposes specified in subsection (1) above.

(6) If an authorisation is given under subsection (5) above, it shall be the duty of the officer who gives it-

(a) to make a written record of the time at which he gives it; and

(b) to cause an officer of the rank of superintendent or above to be informed that it has been given.

(7) The duties imposed by subsection (6) above shall be performed as soon as it is practicable to do so.

(8) An officer to whom a report is made under subsection (6) above may, in writing, authorise the road check to continue.

(9) If such an officer considers that the road check should not continue, he shall record in writing-

(a) the fact that it took place; and

(b) the purpose for which it took place.

(10) An officer giving an authorisation under this section shall specify the locality in which vehicles are to be stopped.

(11) An officer giving an authorisation under this section, other than an authorisation under subsection (5) above-

(a) shall specify a period, not exceeding seven days, during which the road check may continue; and

(b) may direct that the road check-

(i) shall be continuous; or

(ii) shall be conducted at specified times,

during that period.

(12) If it appears to an officer of the rank of superintendent or above that a road check ought to continue beyond the period for which it has been authorised he may, form time to time, in writing specify a further period, not exceeding seven days, during which it may continue.

(13) Every written authorisation shall specify-

(a) the name of the officer giving it;

(b) the purpose of the road check; and

(c) the locality in which vehicles are to be stopped.

(14) The duties to specify the purposes of a road check imposed by subsections (9) and (13) above include duties to specify any relevant serious arrestable offence.

(15) Where a vehicle is stopped in a road check, the person in charge of the vehicle at the time when it is stopped shall be entitled to obtain a written statement of the purpose of the road check if he applies for such a statement not later than the end of the period of twelve months from the day on which the vehicle was stopped.

(16) Nothing in this section affects the exercise by police officers of any power to stop vehicles for purposes other than those specified in subsection (1) above.

Section 116 Meaning of "serious arrestable offence"

(1) This section has effect for determining whether an offence is a serious arrestable offence for the purposes of this Act.

(2) The following arrestable offences are always serious-

(a) an offence (whether at common law or under any enactment) specified in Part I of Schedule 5 to this Act; and

(b) an offence under an enactment specified in Part II of that Schedule.

(3) Subject to subsections (4) and (5) below, any other arrestable offence is serious only if its commission-

(a) has led to any of the consequences specified in subsection (6) below; or

(b) is intended or is likely to lead to any of those consequences.

(4) An arrestable offence which consists of making a threat is serious if carrying out the threat would be likely to lead to any of the consequences specified in subsection (6) below.

(5) An offence under section 1, 9 or 10 of the Prevention of Terrorism (Temporary Provisions) Act 1984 is always a serious arrestable offence for the purposes of section 56 or 57 above, and an attempt or conspiracy to commit any such offence is also always a serious arrestable offence for those purposes.

(6) The consequences mentioned in subsections (3) and (4) above are

(a) serious harm to the security of the State or to public order;

(b) serious interference with the administration of justice or with the investigation of offences or of a particular offence;

(c) the death of any person;

(d) serious injury to any person;

(e) substantial financial gain to any person; and

(f) serious financial loss to any person.

(7) Loss is serious for the purposes of this section if, having regard to all the circumstances, it is serious for the person who suffers it.

(8) In this section "injury" includes any disease and any impairment of a person's physical or mental condition.

Trade Union Act 1984 (c.49)

Industrial action authorised or endorsed by trade union without support of a ballot

Section 10.-(1) Nothing in section 13 of the 1974 Act shall prevent an act done by a trade union without the support of a ballot from being actionable in tort (whether or not against the trade union) on the ground that it induced a person to break his contract of employment or to interfere with its performance.

(2) Nothing in section 13 of the 1974 Act shall prevent an act done by a trade union from being actionable in tort (whether or not against the trade union) on the ground that it induced a person to break a commercial contract or to interfere with its performance where-

(a) one of the facts relied upon for the purpose of establishing liability is that the union induced another person to break his contract of employment or to interfere with its performance; and

(b) by virtue of subsection (1) above, nothing in section 13 of the 1974 Act would prevent the act of inducement referred to in paragraph (a) above from being actionable in tort.

(3) For the purposes of subsection (1) above, an act shall be taken as having been done with the support of a ballot if, but only if-

(a) the trade union has held a ballot in respect of the strike or other industrial action in the course of which the breach or interference referred to in subsection (1) above occurred;

(b) the majority of those voting in the ballot have answered "Yes" to the appropriate question;

(c) the first authorisation or endorsement of any relevant act, and in the case of an authorisation the relevant act itself, took place after the date of the ballot and before the expiry of the period of four weeks beginning with that date; and

(d) section 11 of this Act has been satisfied in relation to the ballot.

(4) In subsection (3)(b) above "appropriate question" means-

(a) where the industrial action mentioned in subsection (3)(a) above is, or includes, a strike, the question referred to in subsection (4)(a) of section 11; and

(b) in any other case, that referred to in subsection (4)(b) of that section.

(5) In this Part-

"the 1974 Act" means the Trade Union and Labour Relations Act 1974;

"authorisation or endorsement" means an authorisation or endorsement of an act which, by virtue of section 15 of the Employment Act 1982, causes the act to be taken, for the purposes mentioned in that section, to have been done by the trade union;

"commercial contract" means any contract which is not a contract of employment;

"contract of employment" has the same meaning as it has in the 1974 Act by virtue of section 30;

"the date of the ballot" means, in the case of a ballot in which votes may be cast on more than one day, the last of those days;

"relevant act" means an act (done in the course of the action mentioned in subsection (3)(a) above) of inducing a person to break his contract of employment or to interfere with its performance;

"tort" as respects Scotland, means delict;

"trade union" has the same meaning as it has in the 1974 Act by virtue of section 28;

and any reference to a breach or interference occurring in the course of a strike or other industrial action includes a reference to a breach or interference which, taken together with any corresponding action relating to other contracts of employment, constitutes that action.

Requirements to be satisfied in relation to ballots

Section 11.-(1) Entitlement to vote in the ballot must be accorded-

(a) equally, to all those members of the trade union who it is reasonable at the time of the ballot for the union to believe will be called upon in the strike or other industrial action in question to act in breach of, or to interfere with the performance of, their contracts of employment or, as the case may be, to continue so to act; and

(b) to no others.

(2) Where a person who was a member of a trade union at the time when a ballot was held for the purposes of this Part-

(a) was denied entitlement to vote in the ballot; and

(b) is induced by the union, in the course of the action in respect of which the ballot was held, to break his contract of employment or to interfere with its performance ("in the course of" having the same meaning as in section 10 of this Act);

this section shall be taken not to have been satisfied in relation to that ballot.

(3) The method of voting in the ballot must be by the marking of a voting paper by the person voting.

(4) The voting paper must contain at least one of the following questions-

(a) a question (however framed) which requires the voter to say, by answering "Yes" or "No", whether he is prepared to take part, or as the case may be to continue to take part, in a strike involving him in a breach of his contract of employment;

(b) a question (however framed) which requires the voter to say, by answering "Yes" or "No", whether he is prepared to take part, or as the case may be to continue to take part, in industrial action falling short of a strike but involving him in a breach of his contract of employment.

(5) Every person who is entitled to vote in the ballot must-

(a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees; and

(b) so far as is reasonably practicable, be enabled to do so without incurring any direct cost to himself.

(6) So far as is reasonably practicable, every person who is entitled to vote in the ballot must-

(a) have made available to him-

(i) immediately before, immediately after, or during his working hours; and

(ii) at his place of work or at a place which is more convenient for him;

or be supplied with, a voting paper; and

(b) be given-

(i) a convenient opportunity to vote by post (but no other opportunity to vote);

(ii) an opportunity to vote immediately before, immediately after, or during his working hours and at his place of work or at a place which is more convenient for him (but no other opportunity); or

(iii) as alternatives, both of those opportunities (but no other opportunity).

(7) The ballot shall be conducted so as to secure that-

(a) so far as is reasonably practicable, those voting do so in secret; and

(b) the votes given in the ballot are fairly and accurately counted (any inaccuracy in counting being disregarded for the purposes of this paragraph if it is accidental and on a scale which could not affect the result of the ballot).

(8) As soon as is reasonably practicable after the holding of the ballot, the trade union shall take steps as are reasonably necessary to ensure that all persons entitled to vote in the ballot are informed of the number of-

(a) votes cast in the ballot;
(b) individuals voting "Yes";
(c) individuals voting "No"; and
(d) spoiled voting papers.

(9) A trade union which has overseas members may choose whether or not to accord any of those members entitlement to vote in a ballot; and nothing in subsections (1) to (7) above shall apply in relation to any overseas member or in relation to any vote cast by any such member.

(10) Where overseas members have voted in the ballot, subsection (8) above shall be read as requiring the information in question to be provided to all those entitled to vote in the ballot other than overseas members and to distinguish between overseas members and other members.

(11) In this section-

"overseas member" has the same meaning as is given in section 9(1) of this Act;

"post" means a postal service which-

(a) is provided by the Post Office or under a licence granted under section 68 of the British Telecommunications Act 1981; or

(b) does not infringe the exclusive privilege conferred on the Post Office by section 66(1) of that Act only by virtue of an order made under section 69 of that Act;

"working hours," in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work; and

"strike" means any concerted stoppage of work.

Public Order Act 1986 (c.64)

Section 1.-(1) Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.

(2) It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously.

(3) The common purpose may be inferred from conduct.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Riot may be committed in private as well as in public places.

(6) A person guilty of riot is liable on conviction on indictment to imprisonment for a term not exceeding ten years or a fine or both.

Section 2.-(1) Where 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder.

(2) It is immaterial whether or not the 3 or more use or threaten unlawful violence simultaneously.

(3) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(4) Violent disorder may be committed in private as well as in public places.

(5) A person guilty of violent disorder is liable on conviction on indictment to imprisonment for a term not exceeding 5 years or a fine or both, or on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

Section 3.-(1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his person safety.

(2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).

(3) For the purposes of this section a threat cannot be made by the use of words alone.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Affray may be committed in private as well as in public places.

(6) A constable may arrest without warrant anyone he reasonably suspects is committing affray.

(7) A person guilty of affray is liable on conviction on indictment to imprisonment for a term not exceeding 3 years or a fine or both, or on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

Section 4.-(1) A person is guilty of an offence if he-

(a) uses towards another person threatening, abusive or insulting words or behaviour, or

(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

Section 5.-(1) A person is guilty of an offence if he-

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove-

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) that his conduct was reasonable.

(4) A constable may arrest a person without warrant if-

(a) he engages in offensive conduct which the constable warns him to stop, and

(b) he engages in further offensive conduct immediately or shortly after the warning.

(5) In subsection (4) "offensive conduct" means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in paragraph (a) and the further conduct need not be of the same nature.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Section 11.-(1) Written notice shall be given in accordance with this section of any proposal to hold a public procession intended-

(a) to demonstrate support for or opposition to the views or actions of any person or body of persons;

(b) to publicise or cause or campaign, or

(c) mark or commemorate an event,

unless it is not reasonably practicable to give any advance notice of the procession.

(2) Subsection (1) does not apply where the procession is one commonly or customarily held in the police area (or areas) in which it is proposed to be held or is a funeral procession organised by a funeral director acting in the normal course of his business.

(3) The notice must specify the date when it is intended to hold the procession, the time when it is intended to start it, its proposed route, and the name and address of the person (or of one of the persons) proposing to organise it.

(4) Notice must be delivered to a police station-

(a) in the police area in which it is proposed the procession will start, or

(b) where it is proposed the procession will start in Scotland and cross into England, in the first police area in England on the proposed route.

(5) If delivered not less than 6 clear days before the date when the procession is intended to be held, the notice may be delivered by post by the recorded delivery service; but section 7 of the Interpretation Act 1978 (under which a document sent by post is deemed to have been served when posted and to have been delivered in the ordinary course of post) does not apply.

(6) If not delivered in accordance with subsection (5), the notice must be delivered by hand not less than 6 clear days before the date when the procession is intended to be held, or if that is not reasonably practicable, as soon as delivery is reasonably practicable.

(7) Where a public procession is held, each of the persons organising it is guilty of an offence if-

(a) the requirements of this section as to notice have not been satisfied, or

(b) the date when it is held, the time when it starts, or its route, differs from the date, time or route specified in the notice.

(8) It is a defence for the accused to prove that he did not know of, and neither suspected nor had reason to suspect, the failure to satisfy the requirements or (as the case may be) the difference of date, time or route.

(9) To the extent that an alleged offence turns on a difference of date, time or route, it is a defence for the accused to prove that the difference arose from circumstances beyond his control or from something done with the agreement of a police officer or by his direction.

(10) A person guilty of an offence under subsection (7) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Section 12.-(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that-

(a) it may result in serious public disorder, serious damage to property or serous disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.

(2) In subsection (1) "the senior police officer" means-

(a) in relation to a procession being held, or to a procession intended to be held in a case where persons are assembling with a view to taking part in it, the most senior in rank of the police officers present at the scene, and

(b) in relation to a procession intended to be held in a case where paragraph (a) does not apply, the chief officer of police.

(3) A direction given by a chief officer of police by virtue of subsection (2)(b) shall be given in writing.

(4) A person who organises a public procession and knowingly fails to comply with a condition imposed under this section is guilty of an offence, but it is a defence for him to prove that the failure arose from circumstances beyond his control.

(5) A person who takes part in a public procession and knowingly fails to comply with a condition imposed under this section is guilty of an offence, but it is a defence for him to prove that the failure arose from circumstances beyond his control.

(6) A person who incites another to commit an offence under subsection (5) is guilty of an offence.

(7) A constable in uniform may arrest without warrant anyone he reasonably suspects is committing an offence under subsection (4), (5) or (6).

(8) A person guilty of an offence under subsection (4) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.

(9) A person guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(10) A person guilty of an offence under subsection (6) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both, notwithstanding section 45(3) of the Magistrates' Courts Act 1980 (inciter liable to same penalty as incited).

(11) In Scotland this section applies only in relation to a procession being held, and to a procession intended to be held in a case where persons are assembling with a view to taking part in it.

13.-(1) If at any time the chief officer of police reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers under section 12 will not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder, he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned.

(2) On receiving such an application, a council may with the consent of the Secretary of State make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State.

(3) Subsection (1) does not apply in the City of London or the metropolitan police district.

(4) If at any time the Commissioner of Police for the City of London or the Commissioner of Police of the Metropolis reasonably believes that, because of particular circumstances existing in his police area or part of it, the powers under section 12 will not be sufficient to prevent the holding of public processions in that area or part from resulting in serious public disorder, he may with the consent of the Secretary of State make an order prohibiting for such period not exceeding 3 months as may be specified in the order the holding of all public processions (or of any class of public procession so specified) in the area or part concerned.

(5) An order made under this section may be revoked or varied by a subsequent order made in the same way, that is, in accordance with subsections (1) and (2) or subsection (4), as the case may be.

(6) Any order under this section shall, if not made in writing, be recorded in writing as soon as practicable after being made.

(7) A person who organises a public procession the holding of which he knows is prohibited by virtue of an order under this section is guilty of an offence.

(8) A person who takes part in a public procession the holding of which he knows is prohibited by virtue of an order under this section is guilty of an offence.

(9) A person who incites another to commit an offence under subsection (8) is guilty of an offence.

(10) A constable in uniform may arrest without warrant anyone he reasonably suspects is committing an offence under subsection (7), (8) or (9).

(11) A person guilty of an offence under subsection (7) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.

(12) A person guilty of an offence under subsection (8) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(13) A person guilty of an offence under subsection (9) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both, notwithstanding section 45(3) of the Magistrates' Courts Act 1980.

Section 14.-(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that-

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation.

(2) In subsection (1) "the senior police officer" means-

(a) in relation to an assembly being held, the most senior in rank of the police officers present at the scene, and

(b) in relation to an assembly intended to be held, the chief officer of police.

(3) A direction given by a chief officer of police by virtue of subsection (2)(b) shall be given in writing.

(4) A person who organises a public assembly and knowingly fails to comply with a condition imposed under this section is guilty of an offence, but it is a defence for him to prove that the failure arose from circumstances beyond his control.

(5) A person who takes part in a public assembly and knowingly fails to comply with a condition imposed under this section is guilty of an offence, but it is a defence for him to prove that the failure arose from circumstances beyond his control.

(6) A person who incites another to commit an offence under subsection (5) is guilty of an offence.

(7) A constable in uniform may arrest without warrant anyone he reasonably suspects is committing an offence under subsection (4), (5) or (6).

(8) A person guilty of an offence under subsection (4) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.

(9) A person guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(10) A person guilty of an offence under subsection (6) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both, notwithstanding section 45(3) of the Magistrates' Courts Act 1980.

Section 5.40 (4) Nothing in this Act affects the common law powers in England and Wales to deal with or prevent a breach of the peace.

SCHEDULE 2

OTHER AMENDMENTS

Conspiracy and Protection of Property Act 1875 (c.86)

Section 1.-(1) In section 7 of the Conspiracy and Protection of Property Act 1875 (offence to intimidate etc. with a view to compelling another to abstain from doing or to do an act) for the words from "shall" to the end there shall be substituted "shall be liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both".

(2) And the following shall be added at the end of that section-

> "A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section".

APPENDIX 2

Canadian and Alberta Statutes

Industrial Disputes Investigation Act 1907 (6-7 Edw. VII c.20)

An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities.

STRIKES AND LOCKOUTS PRIOR TO AND PENDING A REFERENCE TO A BOARD ILLEGAL

Section 56. It shall be unlawful for an employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act: Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike: Provided also that, except where the parties have entered into an agreement under section 62 of this Act, nothing in this Act shall be held to restrain any employer from declaring a lockout, or any employee from going on strike in respect of any dispute which has been duly referred to a Board and which has been dealt with under section 24 or 25 of this Act, or in respect of any dispute which has been the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Law.

Section 57. Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours; and in every case where a dispute has been referred to a Board, until the dispute has been finally dealt with by the Board, neither of the parties nor the employees affected shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute, or anything arising out of the dispute; but if, in the opinion of the Board, either party uses this or any other provision of this Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board so reports to the Minister, such party shall be guilty of an offence, and liable to the same penalties as are imposed for a violation of the next preceding section.

Section 58. Any employer declaring or causing a lockout contrary to the provisions of this Act shall be liable to a fine of not less than one hundred dollars, nor more than one thousand dollars for each day or part of a day that such lockout exists.

Section 59. Any employee who goes on strike contrary to the provisions of this Act shall be liable to a fine of not less than ten dollars nor more than fifty dollars, for each day or part of a day that such employee is on strike.

Section 60. Any person who incites, encourages or aids in any manner any employer to declare or continue a lockout, or any employee to go or continue on strike contrary to the provisions of this Act, shall be guilty of an offence and liable to a fine of not less than fifty dollars nor more than one thousand dollars.

Section 61. The procedure for enforcing penalties imposed or authorized to be imposed by this Act shall be that prescribed by Part XV. of The Criminal Code relating to summary convictions.

Freedom of Trade Union Association Act 1937 (S.A. c.75)

Section 2. Under this Act, "Trade Union" means any association or organization of employees, whether employed by one employer or by more than one employer, which is formed for the purpose of advancing in a lawful manner the interests of such employees in respect of the terms and conditions of their employment and which is free from undue influence, domination, restraint or interference by employers or associations of employers.

Section 3. It shall be lawful for employees to form themselves into a trade union.

Section 4. It shall be lawful for employees to bargain collectively with their employer or employers, and to conduct such bargaining through the employees' trade union, and through the duly chosen officers of such union.

Section 5. It shall be unlawful for any employer hereafter to insert any clause in any written contract of employment, or to impose any condition in any verbal contract of employment, or to continue such clause or condition hitherto in effect, where such clause or condition seeks to restrain any employee from exercising his rights under this Act, and any such clause or condition shall be null and void and of no effect.

Section 6.-(1) Any person being an employer who intimidates any employee, or threatens any employee, or employees generally, with loss of employment, or discharges employees from employment or penalizes or threatens to penalize any employee or employees generally, with the object of preventing any employee or employees generally from belonging to a trade union, shall be guilty of an offence and liable upon summary conviction to a fine not exceeding one hundred dollars and costs in the case of a natural person, for each such offence, or in default of payment to a term of imprisonment of not more than thirty days, and in the case of a body corporate, to a fine not exceeding one thousand dollars.

(2) Every person who is a director of or has the management of the business of a body corporate which commits any act in contravention of this section, shall also be deemed to have committed such act unless he proves either that he had no knowledge of the commission of such act or that he endeavoured to prevent the commission of such act.

Alberta Labour Act S.A. 1947 (c.8)

Section 81.-(1) During the period of time intervening between an application for the appointment of a Conciliation Commissioner under section 68, or for the intervention of the Minister pursuant to subsection (6) or subsection (8) of section 60, as the case may be, and fourteen days after the date fixed for the taking of a vote under subsection (7) of section 80, no employer who is a party to the dispute shall declare or cause a lock-out, nor shall any employees who are parties to the dispute go on strike, nor shall any of the parties alter any of the conditions of employment including wages or hours, but the relationship of employer and employee shall continue uninterrupted by the dispute or anything arising out of the dispute.

(2) Subsection (1) shall not apply in any case where an application under section 68 is refused.

(3) Nothing in this Part shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lock-out or strike.

(4) Notwithstanding anything contained in subsection (1) no employees shall go on strike unless and until a vote has taken place under the supervision of the Board of Industrial Relations, and a majority of the employees affected have voted in favour of a strike.

(5) Where any dispute arises, no employer shall make effective a proposed change in wages or hours or conditions of employment without the consent of the employees, nor shall the employer declare or cause a lock-out, nor shall employees go on strike prior to an application for the appointment of a Conciliation Commissioner under section 68 or prior to an application to the Minister for intervention pursuant to subsection (6) of section 60, as the case may be.

An Act to amend the Alberta Labour Act S.A. 1968 c. 51

Section 28. Section 95 is amended by striking out subsection (1) and by substituting the following:

95. (1) A strike or lockout is illegal,
(a) where the strike or lockout is in contravention of section 94, or
(b) where a collective agreement is in force.

Labour Relations Act R.S.A. 1980 (c.L-1.1)

Section 1 (k) "employee" means a person employed to do work who is in receipt of or entitled to wages, but does not include
(i) a person who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, or
(ii) A person who is a member of the medical, dental, architectural, engineering or legal profession qualified to practise under the laws of Alberta and employed in his professional capacity;

Section 2(1) Subject to subsection (2), this Act applies to every employer and employee.

(2) This Act does not apply to
(a) an employer as defined in the Public Service Employee Relations Act and to whom that Act applies;
(b) a person employed by an employer as defined in the Public Service Employee Relations Act and to whom that Act applies;
(c) employers and employees in respect of whom this Act does not apply by virtue of a provision of another Act;
(d) employees who are police officers of a municipal police force appointed pursuant to the Police Act;
(e) employees employed on a farm or ranch whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, honey, livestock, poultry or bees or to their employer while acting in the capacity of their employer;
(f) employees employed in domestic work in a private dwelling or to their employer while he is ordinarily resident in the dwelling and actin gin the capacity of their employer.

(3) All firefighters, except the chief and the deputy chiefs, have the right
(a) to be members of a trade union and to participate in its lawful activities, and
(b) to bargain collectively with their employer through a bargaining agent.

(4) The bargaining unit for firefighters who bargain collectively shall be the firefighters of the fire department of a municipality excluding the chief and deputy chiefs.

Section 8(1) The Board may for the purposes of this Act
(a) make or issue any orders, decisions, notices, directives, interim directives, declarations or certificates it considers necessary;
(b) receive and investigate applications, references, questions and complaints;
(c) make rules of procedure for the conduct of its business and for hearing and conducting inquiries and for any other matters it considers necessary.

(2) The Board may decide for the purposes of this Act whether:
(a) a person is an employer;
(b) a person is an employee;
(c) an organization or association is an employers' organization;
(d) an organization of employees is a trade union;
(e) an employer has given an employers' organization authority to bargain collectively on his behalf or has revoked that authority;
(f) a collective agreement has been entered into;
(g) a person is bound by a collective agreement;
(h) a person is a party to a collective agreement;
(i) a collective agreement has been entered into on behalf of any person;
(j) a collective agreement is in effect;
(k) the parties to a dispute have settled the terms to be included in a collective agreement;
(l) a group of employees is a unit appropriate for collective bargaining;
(m) a person has applied for membership or has terminated his membership in a trade union;
(n) a person is a member in good standing of a trade union;
(o) a person is included in or excluded from a unit;
(p) an employer is affected by the registration certificate of a registered employers' organization;

and the Board's decision is final and binding.

(3) In addition to the matters specified or referred to in subsections (1) and (2), the Board has all necessary jurisdiction and power to perform any duties assigned to it by the Lieutenant Governor in Council.

Section 18(1) The Board has exclusive jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Board thereon is final and conclusive for all purposes, but the Board may, at any time, reconsider any decision, order, directive, declaration or ruling made by it and vary, revoke or affirm the decision, order, directive, declaration or ruling.

(2) Subject to subsection (3), no decision, order, directive, declaration, ruling or proceeding of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

(3) A decision, order, directive, declaration, ruling or proceeding of the Board may be questioned or reviewed by way of an application for certiorari or mandamus if the application is filed with the Court and served on the Board no later than 30 days after the date of the Board's decision, order, directive, declaration or ruling or reasons in respect thereof, whichever is later.

Section 39(1) A trade union shall not be certified as a bargaining agent if its administration, management or policy is, in the opinion of the Board,

(a) dominated by an employer, or

(b) influenced by an employer so that the organization's fitness to represent employees for the purposes of collective bargaining is impaired.

(2) A trade union shall not be certified as a bargaining agent if, in the opinion of the Board, picketing of the place of employment of the employees affected or elsewhere directly resulted in the

(a) membership of the employees in the trade union,

(b) application for membership of the employees in the trade union, or

(c) indication in writing of the employees' selection of the trade union to be the bargaining agent on their behalf.

Section 83(1) Any collective agreement entered into between an employer or an employers' organization and a trade union that is not a certified bargaining agent may be declared by the Board to be void when in its opinion the administration, management or policy of the trade union is

(a) dominated by an employer, or

(b) influenced by an employer so that the trade union's fitness to represent employees for the purpose of collective bargaining is impaired.

(2) Any collective agreement entered into between an employer or an employers' organization and a trade union as a result of the employer's recognition of the trade union as a bargaining agent may be declared by the Board to be void when in its opinion the

recognition resulted from picketing of the place of employment of the employees affected or elsewhere.

Section 90(1) If a strike vote results in a majority of employees in favour of a strike the bargaining agent may cause a strike only if it

(a) personally serves a written strike notice on the employer or employers' organization that is a party to the dispute giving at least 72 hours notice of the date and time the strike will commence, and

(b) forthwith after service of the notice referred to in clause (a), notifies the Director or a mediator, if a mediator has been appointed under section 84, giving him notice of the date and time the strike will commence.

(2) An employer or, if a lockout vote results in a majority of employers in favour of a lockout, an employers' organization, may lock out or cause a lock out only if it

(a) personally services a written lockout notice on the bargaining agent that is a party to the dispute giving at least 72 hours notice of the date and time the lockout will commence, and

(b) forthwith after service of the notice referred to in clause (a), notifies the Director or a mediator, if a mediator has been appointed under section 84, giving him notice of the date and time the lockout will commence.

(3) No strike notice or lockout notice may be served, or if it is served it is void and of no effect, unless a declaration as to the result of the strike vote or lockout vote, as the case may be, has been filed with the Board.

Section 92 If a strike or lockout does not or is not permitted to occur on the date and at the time specified

(a) in the strike notice or lockout notice, or

(b) if the notice is amended, in accordance with the amended notice,

the notice becomes ineffective and another notice must be served in accordance with section 90 before the party concerned strikes or locks out or causes a strike or lockout, as the case may be.

Section 105(1) No employee, bargaining agent or person acting on behalf of the bargaining agent shall strike or to cause a strike

(a) while a collective agreement is in force between the bargaining agent and an employer or employers' organization,

(b) if a disputes inquiry board is established before a strike commences

(i) until 10 days after the Minister serves a copy of the recommendation of the disputes inquiry board on the parties, or

(11) if the Board supervises a vote under section 102.2, until 72 hours after the Board notifies the parties of the results of that vote,

(c) within 30 days after the date of certification of the bargaining agent except where the employer is affected by the registration, or

(d) if a notice to commence collective bargaining has been served pursuant to section 73(1) within 30 days after the date of certification of the bargaining agent, until 60 days after the date on which the notice was served.

(2) Subject to subsection (1), an employee, bargaining agent or person acting on behalf of the bargaining agent is entitled to strike or cause a strike if

(a) a strike vote resulted in a majority in favour of a strike,

(b) strike notice is given in accordance with this Act, and

(c) the strike commences on the day and at the time specified in the strike notice or, if an amendment to the strike notice is agreed to and is permitted under this Act, on the day and at the time specified in the amendment.

(3) No employee, bargaining agent or person acting on behalf of a bargaining agent shall threaten to strike or cause a strike unless the strike is permitted by this Act.

Section 111 The right to commence or cause a strike or lockout lasts for one year from the date of the strike vote or lockout vote, as the case may be.

Section 112(1) Notwithstanding anything in this Act, the Judicature Act or any other Act, when there is a strike or lockout no injunction before trial shall be granted ex parte to

(a) a party to the dispute, or

(b) any other person or party,

to restrain a party to the strike or lockout from doing any act in connection with the strike or lockout.

(2) Every affidavit intended to be used in support of an application for an interim injunction to restrain a person from doing any act in connection with a strike or lockout shall be confined to those facts that the deponent is able of his own knowledge to prove, and a copy of the affidavit shall be served with the notice of motion.

(3) If members of a trade union are the defendants or intended defendants, the notice of motion may be served on an officer of the trade union or a member of it who is engaged in the activity proposed to be restrained or a person engaged in that activity.

(4) The notice of motion shall be served in sufficient time before the time fixed for the hearing, not being less than 4 hours in

any event, to enable the person to attend at the hearing of the motion.

Section 114(1) When there is a strike or lockout that is permitted under this Act, a trade union, members of which are on strike or locked out, and anyone authorized by the trade union may, at the striking or locked out employees' place of employment and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to

(a) enter the employer's place of business, operation or employment,
(b) deal in or handle the products of the employer, or
(c) do business with the employer.

(2) Except as provided in subsection (1), no trade union or other person shall persuade or endeavour to persuade anyone not to

(a) enter the employers' place of business, operation or employment,
(b) deal in or handle the products of any person, or
(c) do business with any person.

Compulsory Arbitration

Section 117.1(1) This Division applies to the following:

(a) firefighters and municipalities to the extent that they bargain collectively with those firefighters;
(b) employers who operate approved hospitals as defined in the Hospitals Act, and all the employees of those employers.

(2) No employee to whom this Division applies shall strike.

(3) No employer shall lock out employees to whom this Division applies.

(4) This Division applies notwithstanding any other provision of this Act.

Section 140 No employee shall

(a) refuse to perform work for his employer for the reason that other work was or will be performed or was not or will not be performed by any person or class of persons who were or are not members of a trade union or a particular trade union, or
(b) refuse to take delivery of goods from a carrier or refuse to assist the carrier in the loading of goods for shipment except where the carrier and his employees are engaged in a strike or lockout permitted by this Act.

Public Service Employee Relations Act R.S.A. 1980 (c.P-33)

[The Act applies to:]

SCHEDULE

Section 1 All the following employers and all of the persons employed by them:

(a) The Alberta Government Telephones Commission;
(b) The Alberta educational Communications Corporation;
(c) Alberta Resources Railway Corporation;
(d) The Alberta General Insurance Company;
(e) The Board of the Northland School Division No. 61;
(f) every board of administrators of a new town formed under the New Towns Act;
(f.1) the Special Areas Board;
(g) The Life Insurance Company of Alberta;
(h) Irrigation Land Manager;
(i) every board of trustees of a drainage district formed or continued under the Drainage Districts Act;
(j) every housing authority incorporated under section 42 of the Alberta Mortgage and Housing Corporation Act;
(k) the Glenbow-Alberta Institute;
(l) the Alberta Heritage Foundation for Medical Research;
(m) the Alberta Special Waste Management Corporation.

Section 2(1) The board of governors of each university under the Universities Act while it is acting as the employer of its academic staff as defined in the Universities Act.

(2) The academic staff as defined in the Universities Act of each university.

Section 3(1) The college board of each college under the Colleges Act while it is acting as the employer of its academic staff members as defined in the Colleges Act.

(2) The academic staff members as defined in the Colleges Act of each college board.

Section 4(1) The board of governors of a technical institute under the Technical Institutes Act while it is acting as the employer of its academic staff members as defined in the Technical Institutes Act of the board of governors of a technical institute.

(2) The academic staff members as defined in the Technical Institutes Act.

Section 5(1) The Governors of the Banff Centre for Continuing education while it is acting as the employer of its academic staff as defined in the Banff Centre Act.

(2) The academic staff members as defined in the Banff Centre Act of The Governors of the Banff Centre for Continuing Education.

Section 6(1) The Liquor Control Board, to the extent that it acts as the employer of employees other than employees employed in the following offices or departments:

(a) the office of the Board;
(b) the office of the General Manager;
(c) the Licensing Department;
(d) the Permit Department.

(2) The employees of the Liquor Control Board other than those employees referred to in clauses (a) to (d) of subsection (1).

Section 92.1(1) Notwithstanding anything in this Act, the Judicature Act or any other Act, when an action occurs that either party considers to be a strike or lockout, no injunction before trial shall be granted ex parte to

(a) a party to the dispute, or
(b) any other person or party

to restrain a party to the strike or lockout from doing any act in connection with the strike or lockout.

(2) Every affidavit intended to be used in support of an application for an interim injunction to restrain a person from doing any act in connection with a strike or lockout shall be confined to those facts that the deponent is able of his own knowledge to prove, and a copy of the affidavit shall be served with the notice of motion.

(3) If members of a trade union are the defendants or intended defendants, the notice of motion may be served on an officer of the trade union or a member of it who is engaged in the activity proposed to be restrained or a person engaged in that activity.

(4) The notice of motion shall be served in sufficient time before the time fixed for the hearing, not being less than 4 hours in any event, to enable the person to attend at the hearing of the motion.

Section 93(1) No person or trade union shall cause or attempt to cause a strike by the persons to whom this Act applies.

(2) No person to whom this Act applies shall strike or consent to a strike.

Section 93.1(1) Any trade union that causes or attempts to cause a strike contrary to section 93 is guilty of an offence and liable to a fine not exceeding $1000 for each day that the strike continues.

(2) Any officer or representative of a trade union who strikes or causes or consents to a strike contrary to section 93 is guilty of an offence and liable to a fine not exceeding $10 000.

(3) Any person who is not a trade union or an officer or representative of a trade union who strikes or causes a strike contrary to section 93 is guilty of an offence and liable to a find not exceeding $1000.

Police Officers Collective Bargaining Act R.S.A. 1980 (c.P-12.05)

Section 2(1) All police officers, except the chief constable and deputy chief constables, have the right

(a) to be members of a police association and to participate in its lawful activities, and
(b) to bargain collectively with the municipality to which they are appointed through a bargaining agent,

except that no police officer shall remain or become a member of a trade union or of an organization that is affiliated, directly or indirectly, with a trade union.

(2) Notwithstanding subsection (1), if an application by a local authority within the meaning of the Special Forces Pension Plan Act to bring its police officers under that Act has been granted, there shall be no right to bargain collectively for pension benefits.

Section 3(1) Notwithstanding section 2, no police officer, bargaining agent or person acting on behalf of a bargaining agent shall strike, cause a strike or threaten to cause a strike.

(2) No municipality shall lock out or threaten to lock out members of a bargaining unit.

Police Act R.S.A. 1980 c.P-12

Section 31(1) Every member of a police force has the power and it is his duty to

(a) perform all duties that are assigned to peace officers in relation to

(i) the preservation of peace;
(ii) the prevention of crime and of offences against the laws in force in Alberta, and

(iii) the apprehension of criminals and offenders and others who may lawfully be taken into custody,

and

(b) execute all warrants and perform all duties and services thereunder or in relation thereto that under the laws in force in Alberta may lawfully be executed and performed by peace officers.

Petty Trespass Act R.S.A. 1980 (c.P-6)

Section 1(1) No person shall trespass on

(a) privately owned land,
(b) Crown land subject to any disposition granted under the Public Lands Act, except a grazing lease or a grazing permit, or
(c) a garden or lawn,

with respect to which he had had notice by word of mouth, or in writing, or by posters or signboards, not to trespass.

(2) For the purposes of subsection (1) a person shall be deemed to have had notice not to trespass when poster or signboards are visibly displayed

(a) at all places where normal access is obtained to the land, and
(b) at all fence corners or if there is no fence, at each corner of the land.

Criminal Code R.S.C. 1970 c.C-34

Section 31. (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists him is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable and probable grounds, he believes is about to join in or renew the breach of the peace.

(2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable and probable grounds he believes has, witnessed the breach of the peace.

Section 64. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

(a) will disturb the peace tumultuously, or

(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.

(3) Persons are not lawfully assembled by reason only that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.

Section 65. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

Section 118. Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or

(c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,

is guilty of

(d) an indictable offence and is liable to imprisonment for two years, or

(e) an offence punishable on summary conviction.

Section 171. (1) Every one who

(a) not being in a dwelling-house causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

(ii) by being drunk, or

(iii) by impeding or molesting other persons,

(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are there, or

(d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling-houses comprised in the building or structure have access as a right or by invitation, express or implied,

is guilty of an offence punishable on summary conviction.

(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a) or (d) was caused or occurred.

Section 381. (1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing

(a) uses violence or threats of violence to that person or his spouse or children, or injures his property,

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted upon him or a relative of his, or that the property of any of them will be damaged,

(c) persistently follows that person about from place to place,

(d) hides any tools, clothes or other property owned or used by that person, or deprives him of them or hinders him in the use of them,

(e) with one or more other persons follows that person, in a disorderly manner, on a highway,

(f) besets or watches the dwelling-house or place where that person reside, works, carries on business or happens to be, or

(g) blocks or obstructs a highway,

is guilty of an offence punishable on summary conviction.

(2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

Section 387. (1) Every one commits mischief who wilfully

(a) destroys or damages property,

(b) renders property dangerous, useless, inoperative or ineffective,

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(1.1) Every one commits mischief who wilfully
(a) destroys or alters data;
(b) renders data meaningless, useless or ineffective;
(c) obstructs, interrupts or interferes with the lawful use of data; or
(d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.

(2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and is liable to imprisonment for life.

(3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds one thousand dollars
(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
(b) is guilty of an offence punishable on summary conviction.

(4) Every one who commits mischief in relation to property, other than property described in subsection (3),
(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two year; or
(b) is guilty of an offence punishable on summary conviction.

(5) Everyone who commits mischief in relation to data
(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
(b) is guilty of an offence punishable on summary conviction.

(5.1) Every one who wilfully does an act or wilfully omits to do an act that it is his duty to do, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to property or data,
(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years; or
(b) is guilty of an offence punishable on summary conviction.

(6) No person commits mischief within the meaning of this section by reason only that
(a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment,
(b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree upon any matter relating to his employment, or
(c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.

(7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

(8) In this section, "data" has the same meaning as in section 301.2. 1972, c.13, s.30; 1985, c.19, s.58.

Canadian Bill of Rights

S.C. 1960, c.44

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART 1

BILL OF RIGHTS

Section 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
(b) the right of the individual to equality before the law and the protection of the law;
(c) freedom of religion;
(d) freedom of speech;
(e) freedom of assembly and association; and
(f) freedom of the press.

Section 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
(b) impose or authorize the imposition of cruel and unusual treatment or punishment;
(c) deprive a person who has been arrested or detained
    (i) of the right to be informed promptly of the reasons for his arrest or detention,
    (ii) of the right to retain and instruct counsel without delay, or
    (iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is now lawful;
(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Section 3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Section 4. The provisions of this Part shall be known as the Canadian Bill of Rights.

ALBERTA BILL OF RIGHTS

CHAPTER A-16

WHEREAS the free and democratic society existing in Alberta is founded on principles that acknowledge the supremacy of God and on principles, fostered by tradition, that honour and respect human rights and fundamental freedoms and the dignity and worth of the human person; and

WHEREAS the Parliament of Canada, being desirous of enshrining certain principles and the human rights and fundamental freedoms derived from them, enacted the Canadian Bill of Rights in order to ensure the protection of those rights and freedoms in Canada in matters coming within its legislative authority; and

WHEREAS the Legislature of Alberta, affirming those principles and recognizing the need to ensure the protection of those rights and freedoms in Alberta in matters coming within its legislative authority, desire to enact an Alberta Bill of Rights;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Section 1 It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:

(a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association;

(f) freedom of the press.

Section 2 Every law of Alberta, shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the Alberta Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms here in recognized and declared.

The Charter of Rights and Freedoms-Canada Act 1982 (U.K. c.11)

Schedule B

Guarantee of Rights and Freedoms

Section 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Section 2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 8. Everyone has the right to be secure against unreasonable search or seizure.

Section 9. Everyone has the right not to be arbitrarily detained or imprisoned.

Section 10. Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Section 11. Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury

where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Section 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 32.(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes
(a) the Canada Act 1982 including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Edmonton Traffic By-Law No. 5590

102 (22) "Parade" or "Procession", with the exception of a military parade or funeral procession shall mean any group of

(a) More than Fifty (50) pedestrians, or

(b) More than Ten (10) vehicles, or

(c) Any combination of pedestrians and vehicles which together exceed Fifty (50) in number

on a highway that is likely to block, obstruct, impede, hinder or otherwise interfere with pedestrian or vehicular traffic on the highway.

403 (1) OBSTRUCTING HIGHWAY

No person shall stand in a group of Three (3) or more persons or so near to each other on any highway as to obstruct the entrance to buildings or to obstruct or prevent other persons using such highway and forthwith after request has been made by a Peace Officer or other person duly authorized so to do, shall disperse and move away.

(2) No person shall so conduct himself or otherwise position himself on a highway in such a manner as to obstruct vehicular or pedestrian traffic or as to inconvenience any other person upon the highway.

404 PUBLIC MEETINGS

Nothing in Section 403 shall be construed as prohibiting (except on 101st [Jasper] Avenue between 96th Street and 105th Street, on 97th Street between 101st [Jasper] Avenue and the Canadian National Railway right-of-way; and on 82nd [Whyte] Avenue between 101st Street and 107th Street) the congregating or assembling of individuals to attend and listen to street preaching or public speaking so long as the proceedings thereat are peaceable and orderly and sufficient space is left on the highway to allow free movement of the ordinary traffic; but should any highway at or near such assembly become so obstructed as to obstruct or impede such ordinary traffic, the persons so obstructing or impeding shall forthwith move away upon being requested so to do by a Peace Officer or by any other person duly authorized. Any person refusing or failing to forthwith move away upon being requested as aforesaid shall be guilty of a breach of this Bylaw.

405 WATCHING PARADE

Nothing in Section 403 shall be construed as prohibiting the assembling of persons for the purpose of watching a parade or precession duly authorized by the Mayor or Council by resolutions.

901 (1) PERMIT NECESSARY

(a) No person shall hold or take part in any parade or procession without first obtaining a permit from the Mayor or Council by resolution subject to such terms and conditions the Mayor or Council by resolution deems advisable, for the parade or procession to be held.

(b) Every member of a parade or procession and the organization and leaders thereof shall be guilty of an offence for each and every violation of this Section.

(2) Any person desiring to hold a parade or procession within the City of Edmonton shall at least, Forty-Eight (48) hours prior to the time they desire to hold the same make application in writing to the Mayor and in such application shall furnish to the Mayor information with respect to the following, namely:

(a) The name and address of the applicant, and if such application is an organization, the names, addresses and occupations of the executives thereof;

(b) The nature and object of such parade or procession;

(c) The day, date and hours during which same will be held;

(d) The intended route thereof;

(e) The approximate number of persons and/or vehicles taking part therein;

(f) The approximate size, number and nature of flags, banners, placards or such similar things to be carried therein and particulars of signs, inscriptions and wording to be exhibited thereon; and such written application shall bear the signatures and addresses of the persons who will be in control of such parade or procession and who undertake to be responsible for the good order and conduct thereof.

(3) During such parade or procession all pedestrians not taking part therein shall be restricted to the use of the sidewalk area.

NOT TO OBSTRUCT

(4) No parade or procession shall move at a slower speed than Five (5) kilometres per hour, or obstruct any highway for a longer period than is reasonably necessary.